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Supreme Court of the United States.

OCTOBER TERM, 1902. No. 450.

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JAMES H. McKENNEY,
Clerk.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and the Rapid Transit Underground Railroad Company,
Complainants, Appellants,

against

THE CITY OF NEW YORK, Robert A. Van Wyck, individually and as Mayor of the City of New York, Bird S. Coler, individually and as Comptroller of the City of New York, Albert E. Orr, John H. Starin, Woodbury Langdon, George L. Rives, Charles L. Smith and Morris K. Jesup, individually and as Members of the pretended Board of Rapid Transit Commissioners of the City of New York, John B. McDonald, and the Rapid Transit Subway Construction Company,
Defendants, Respondents.

BRIEF FOR COMPLAINANTS, APPELLANTS.

ROGER FOSTER,
Of Counsel for Complainants, Appellants.

18,717.

Supreme Court of the United States.

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Complainants, Appellants,

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Defendants, Respondents.

Brief for Complainants, Appellants.

Statement.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a bill in equity as amended for want

of jurisdiction. The bill prayed an injunction against the construction and operation of an underground railroad and subway on Manhattan Island, in the City of New York, upon a route to which the complainants, who are taxpayers, have a prior exclusive right, and against the payment by the defendants, who are or claim to be municipal officers, of any money under color of the Rapid Transit Act, to the defendants McDonald and Subway Construction Company, or to any one, and against their issuing bonds or stock of the City of New York under color of the Rapid Transit Act, or to obtain money to aid in the construction of such underground railroad; and for a receiver to take possession of so much of the underground railroad as is already constructed. The complaint also contains the prayer for general relief under which a decree might be granted computing the payment of the value of the complainants' franchises, in lieu of an injunction.

(*New York vs. Pine*, 185 U. S., 93.)

The complainants have tendered to the defendant the City of New York and offer to pay it all sums of money heretofore paid by the city for the construction of the subway.

The demurrers, which are all alike, allege that the Court has no jurisdiction in the premises, because the parties to the suit are citizens of this state and it is claimed that the suit does not involve any question arising under the Constitution or laws of the United States; that the bill does not state a case entitling the complainants in a court of equity to any relief; that the bill is multifarious, by a misjoinder of defendants without showing any reasons for the multifariousness; and laches.

These demurrers admit the following facts, which are set forth in the bill: The Central Tunnel Railway Company which has been merged, by consolidation, in

the complainant, the Underground Railroad of the City of New York, and which has leased its route to the other complainant, the Rapid Transit Underground Railroad Company was organized on March 26th, 1881, under the General Railroad and Tunnel Law of the State of New York (L. 1850, Ch., 140; L. 1880, Ch., 582). Subscriptions were duly made for stock of that corporation to the extent of two thousand dollars for each mile of its proposed railroad, and more than fifty per cent. of the par value of the stock was paid in cash to the corporation by the subscribers before the articles of association were filed. On March 28th, 1882, a map and profile of the route adopted was duly signed and certified by the president, engineer and a majority of the Board of Directors of the company, and filed in the office of the Register of the County of New York, in accordance with Section 45 of the General Railroad Law then in force (L. 1850, Ch. 140).

The route therein described, and which is specifically set forth in the articles of association annexed to the bill (Exhibit A), was five miles in length, underground, and extended from City Hall Park under Elm Street and other streets to and under Forty-second Street at the Grand Central Depot, connecting with the Fourth Avenue Improvement and viaduct.

> "Written notice of the time and place where "said map and profile were filed, and that the "route described thereon passed over the lands "of such occupants, was duly given by said cor- "poration on or before June 20th, 1882, to all "the occupants of land over which the route of "said railroad and tunnel was so designated. "The route and line of said corporation were "duly surveyed, costly plans, estimates and "specifications for its construction were made,

"and *more than a hundred thousand dollars was*
"*spent by said corporation in surveying, prepar-*
"*ing plans and specifications and preparing for*
"*the construction of the railroad and tunnel de-*
"*scribed in its articles of association and maps*"
(p. 4, fol. 8).

The Tunnel Law (N. Y. L. 1880, Ch. 582, § 1), which is quoted in full in the bill, provides that, in case the consent of the municipal authorities and the owners of property bounded on the line cannot be obtained when the railroad company intends to build the whole or part of its railroad in any city, the General Term of the Supreme Court in the district:

"May, upon application, appoint three com-
"missioners, who shall determine, after hearing
"other parties interested, whether such railroad
"ought to be allowed to be built underneath said
"street, roads and public places, or any of them,
"and in what manner the same may be so built
"with the least damage to the surface and to
"the use of the surface by the public; and the
"determination by said commissioners, con-
"confirmed by the Court, may be taken in lieu
"of the consent of said authorities and proper-
"ty owners."

The Central Tunnel Railway Company, having failed to obtain the consent of the property owners, applied to the General Term of the Supreme Court for the First Department for the appointment of commissioners in accordance with this statute. On February 2nd, 1883, the General Term made an order, a copy of which is annexed to the bill and marked "Exhibit B," granting the application and appointed as commissioners Wm. G. Choate, John T. Agnew and James McLean. Messrs. Choate and McLean accepted their appointment, qualified and entered upon the discharge

of their duties. Proceedings under the order before them are still pending and undetermined, for the following reasons: Mr. Agnew declined to accept the appointment and refused to qualify. The corporation then applied to the General Term for the appointment of a commissioner in his place. William R. Grace was duly appointed. Mr. Grace declined the appointment and refused to serve. Thereupon the corporation duly applied to the General Term for the appointment of a third commissioner to fill the vacancy, and at the same time offered to deposit in any place which the Supreme Court might designate the sum of $5,000 as security for the payment of the expenses of the commissioners. *The application was granted,* and the order providing for filling the vacancy, but leaving the name of the new commissioner in blank to be supplied by the Court, was duly drafted by the attorney for the corporation and submitted to the General Term. Neither the General Term nor its successor, the Appellate Division, has ever filled said vacancy, or signed or entered this order. For that reason the corporation has been unable to proceed before the commissioners (p. 7, fols. 12, 13).

We ask the Court to take judicial notice of the fact that during all this time proceedings were pending before the Legislature and the municipal boards to procure the widening of Elm Street. These did not result in the appointment of the Elm Street Commissioners of appraisal till 1895. The proceedings before those commissioners were not pending and the Street was not widened until after 1898. (*Re Elm Street*, 46 App. Div. 624.) The previous construction of the complainants' tunnel under Elm Street would have interferred with that project and greatly increased the expenses of the improvement. *This seems to have been the reason for the delay of the State Court in filling the vacancy in the Complainants' Commission.*

Proceedings by Central Tunnel Railway Company.

On August 21st, 1896, the Central Tunnel Railway Company, together with two other corporations, the lines and routes of which formed a continuous and connected line with its line and routes, were duly merged and consolidated into a new corporation, the Underground Railroad of the City of New York, which is one of these complainants. The articles of consolidation and incorporation of the Underground Railroad of the City of New York were duly filed in the office of the Secretary of State of New York on October 2nd, 1896, and a tax one-eighth of one per centum on its capital stock was duly paid to the state by the corporation and its incorporators. These articles of consolidation and incorporation, set forth in paragraph five of the bill, describe its route as including that of the Central Tunnel Railway Company. A map and profile of the route was duly signed, certified and filed in the office of the Register on June 10th, 1897. (pp. 10-12 fols. 17-20.)

Afterwards, on April 9th, 1897, the other complainant, the Rapid Transit Underground Railroad Company, was duly organized under and pursuant to Chapter 39 of the General Laws. A certificate of incorporation was then duly filed in the office of the Secretary of State and the Clerk of the County of New York. The length, termini and route, as stated in the certificate, included that of the Central Tunnel Railway Company, and also extended from the Grand Central depot westerly through and under Forty-second Street and the cross streets to Broadway, and thence northerly under Broadway and the cross streets to and under Fifty-ninth Street; thence northerly through and under the Boulevard and Eleventh Avenue and under the cross street to One Hundred and Fifty-fifth Street. A franchise tax of one-eighth of one per cent. upon the capital stock was paid by the corporation to the

state. By the acceptance of the franchise tax from these two companies the State of New York entered into a contract with them granting to them the exclusive right and franchise to construct and operate a railroad upon the route specified in their articles of incorporation. This corporation has since paid taxes to the City, County and State, and is a taxpayer. (pp. 12, 13, fols. 21-23.) On October 11th, 1897, the Rapid Transit Underground Railroad Company filed a map and profile of its route, duly certified in the office of the Register of the City and County of New York, and a duplicate original of the same in the office of the clerk of the county, and written notice of the time and place of said filing was duly given to all the occupants of the land over which the route of the railroad was designated (p. 14, fol. 23).

On April 29th, 1897, the Underground Railroad of the City of New York leased to the Rapid Transit Underground Railroad its railroad routes and franchises for the term of the corporate existence of the Rapid Transit Underground Railroad Company, in accordance with the General Railroad Law (N. Y. General Laws, Ch. 39, Art. III). The contract provided, in accordance with §79 of the law, for a consideration in cash, which was duly paid, and for the exchange of the stock of the lessor for the stock of the lessee company (p. 14, fols. 23, 24). This exchange was duly made and the contract duly ratified by the stockholders and directors of both corporations. By these proceedings the Rapid Transit Underground Railroad Company acquired the exclusive franchise to build and operate a railroad and tunnel over the route hereinbefore described.

On April 6th, 1898, the Appellate Division of the Supreme Court for the First Department, the consent of the Common Council, Mayor and legal authorities of the City of New York having been previously duly

obtained, confirmed the report of commissioners previously appointed, determined that a railroad and tunnel should be constructed and operated upon the route described in the articles of incorporation of the Central Tunnel Railway Company and the Rapid Transit Underground Railroad Company, and granted a consent to the construction of said route in lieu of the consent of the property owners bounding thereupon. This consent was made upon the application of the defendants, the Board of Rapid Transit Commissioners; but the plans and specifications which they proposed were the same plans and specifications, that had been adopted by the Central Tunnel Railway Company, prepared by engineers who had formerly been in the employ of the Central Tunnel Railway Company; and the consent thus given inured to the benefit of the persons who had an exclusive franchise to construct a railroad and tunnel on said route; namely, these complaints (p. 28, fols. 46, 47).

> "The said defendants, by force and threats, "have hitherto prevented your orators from "constructing a street railway and tunnel upon "said route" (p. 28, fol. 27).

The defendants McDonald and the Rapid Transit Subway Construction Company, with the connivance and assistance of the other defendants, are now engaged in constructing an underground railroad and tunnel upon the route specified in the articles of association of the Central Tunnel Railway Company and the Rapid Transit Underground Railroad Company, as is hereinbefore described, and to which these complainants have obtained an exclusive right and franchise as hereinabove set forth. They are doing this under color of an alleged contract with the City of New York, known as the Rapid Transit Contract, and other proceedings under the so-called Rapid Transit Act of 1891, as subsequently amended (N. Y. L. 1891,

Ch. 4). The material provisions of this act are set forth in full in the bill in equity. This act, which is alleged by the complainants to be unconstitutional, appoints "in each city having over one million inhabi-"tants according to the last preceding National or "State census," a Board of Rapid Transit Commissioners, consisting of five persons therein named, the mayor and comptroller of the city and President of the Chamber of Commerce of the City of New York.

> "Vacancies which may take place in the "offices so held by the persons specifically "named as such commissioners shall be filled "by a majority vote of the remaining members "of said board" (§1).

The commissioners are authorized to expend money of the city and to receive compensation for their services (§§61, 62). The act purports to authorize the Rapid Transit Commisioners to construct an underground railroad upon the route selected by them at the expense of the city, and for that purpose to enter into a contract for the construction of a railroad upon such routes in accordance with the plans and specifications adopted by the commissioners at a price fixed by them which the city shall pay to such contractor (§34). The act further purports to authorize the board to agree with the contractor, that he shall equip, maintain and operate the railroad thus constructed for a term of years specified in the contract, not less than thirty-five or more than fifty years, and for a subsequent renewal of said lease (§34). The contractor is required by the law to give a bond to the city in such amount as the board may require, with sureties to be approved by the board, who shall justify in the aggregate in double the amount of the bond (§34). The act purports to authorize the board and all persons acting under its authority to take possession of all the lands and properties, which it deems neces-

sary to be acquired, or appurtenant to which there may be franchises, easements or privileges which it deems necessary to be acquired or extinguished by the city; to prepare maps designating the same and to procure the same to be filed in the Department of Public Works and other public offices (§40). It then provides that the counsel to the corporation shall present to the Supreme Court a petition by the board praying for the appointment of Commissioners of Appraisal (§ 43); that the Commissioners of Appraisal shall be appointed after certain notices under the act described; that they shall take and file the constitutional oath (§46); that upon filing said oath the city shall acquire the fee and absolute ownership to all parcels of property described in the map or appurtenant to the same before the award of the value thereof to the owner and before payment of any compensation to them (§47).

The demurrer admits that the City of New York has already incurred indebtedness in excess of its debt limit, and the following allegations:

> *"The said City of New York is insolvent.*
> "Any indebtedness and any claim against the "City of New York attempted to be created "for the benefit of property holders upon the "route of said Underground Railroad will be, "and any such indebtedness or claim heretofore "sought to be created on their behalf is and "has been, null and void for the reason that the "same is and has been forbidden by the said "Article of the Constitution of the State of "New York hereinbefore quoted" (p. 20, fol. 34).

On February 24th, 1900, under color of the Rapid Transit Act, the Rapid Transit Board entered into the Rapid Transit Contract with the defendant McDonald. This purports to bind the City of New York to pay to

the said contractor the sum of $36,500,000 for the construction of an underground railroad and tunnel in New York City along the route of the complainants; and purports to grant to him the right to operate a railroad upon this route for the period of fifty years, with a right of renewal for a further period of twenty-five years (pp. 28, 29, fol. 47).

This contract is void for a number of reasons set forth in the bill in equity. It was entered into under mistakes of fact and law on the part of the Rapid Transit Board and the City of New York, and by fraud and imposition and undue influence practiced upon them by the defendant McDonald and the Subway Company and by "persons with great political influ-"ence in the City of New York, some of whom were "City officers and were secretly interested in the said "contract and in the said Rapid Transit Subway Con-"struction Company, and who dominated the action "of the persons who executed said Rapid Transit Con-"tract on the part of the City of New York" (p. 29, fol. 47). At the time when said contract was executed, the board and city believed that Sections 3 and 14 of the Labor Law of the State of New York (L. 1897, Ch. 415; G. L. Ch.) were valid, and consequently they inserted in the Rapid Transit Contract a promise by the contractor, that he would obey those sections of the labor law and pay and compel the payment of the prevailing rate of wages to all workmen upon the subway and tunnel, use no stone in its construction which had been worked, dressed or carved outside the State of New York, and allow no laborers to work more than eight hours a day upon said work. The contract provided that in case of a disobedience to any part of this stipulation the contract should be null and void. By reason of the insertion of these clauses in this contract and the expectation that the same would be obeyed by the contractor,

it was believed by the Rapid Transit Board and municipal authorities that the cost of construction would be increased at least twenty per cent. and the contract price for said work set forth in the contract was increased twenty per cent. accordingly. Mr. McDonald had then been secretly advised that these sections of the Labor Law were unconstitutional and void, and he did not then intend to obey them. He procured his counsel to institute and argue two test cases before the Court of Appeals of the State of New York (*People ex rel. Rogers vs. Coler*, 166 N. Y., 1, and *People ex rel. Treat vs. Coler*, 166 N. Y., 144), in which a majority of that Court held, that so much of the Labor Law as forfeits contracts for a failure to pay the prevailing rate of wages to workmen and for the use of stone worked, dressed or carved outside of the State of New York, were unconstitutional and void, and that the nullification of this clause in such contracts did not impair nor affect the validity of the remaining clauses therein. The contractor and his asignee have disobeyed and intend to disobey these clauses in the Rapid Transit Contract; and have compelled laborers to work more than eight hours a day upon the work, thus forfeiting the contract, since the Eight Hour Law has not been impugned by the New York Courts (pp. 29, 30, fols. 48, 49).

Before letting the contract to Mr. McDonald, the commissioners advertised for proposals and bids for the contract, and stated in their advertisements as one of the conditions of said contract that the contractor must bind himself to furnish sureties for the faithful performance of the contract in the sum of $5,000,000; and that each of the sureties must be bound for at least $500,000 dollars of the penalty and justify in double the amount for which he is bound.

"Before said Rapid Transit contract was exe-
"cuted, they secretly agreed with said defend-

"ant McDonald that the terms of the same "would be modified so as to diminish by one-"half security for the performance of the said "contract, required of the said McDonald in the "draft of the contract as originally submitted "and as incorporated in said invitation; and up-"on the same day that said Rapid Transit "contract was executed an agreement was made "purporting to be a modification of said con-"tract in that respect; and no security in ac-"cordance with the original contract and the "original invitation to submit proposals and "bids has been given by the said McDonald or "by any one." "Had it been announced in the "said invitation to contract that said Rapid "Transit contract would be thus modified and "that the security for its performance would be "thus diminished, other contractors would have "offered to accept said contract for much less "compensation than is under the provisions of "said contract to be paid to the said defendant "McDonald" (p. 30, fols. 49, 50).

The contract has been assigned by the defendant McDonald to the defendant the Rapid Transit Subway Construction Company. These two defendants and the persons who own the legal and equitable interest in the stock and control the Construction Company have procured the organization of a corporation named the Subway Realty Company. In the name of this corporation they have bought and are now buying,

"real estate necessary for the construction "and operation of said railroad for the purpose "of leasing or selling the same, or parts thereof, "to the City of New York, at an exorbitant "price. Such conduct by him and by them "is a violation of the expressed and implied "terms and conditions of said Rapid Transit

"contract. The said Rapid Transit contract is "for these and other reasons void, and not "binding upon the City of New York" (p. 30, fol. 50).

The assignee of the Rapid Transit contract, the defendant the Rapid Transit Subway Construction Company, has not been organized under the railroad laws of the State of New York, but is a business corporation organized under the Business Corporation Law of the State of New York, (N. Y. General Laws, Ch. XLI, L. 1892, Ch. 691) and it has no power under this law or under its articles of incorporation either to construct or to operate a railroad. Since its incorporation it has applied to the New York Legislature for authority to construct and operate the railroad and tunnel specified in the Rapid Transit contract, but the Legislature has refused to grant it such permission (p. 31, fol. 51).

In accordance with the rules of this Court we here insert our

Assignment of Errors.

I. The court erred in holding that it had no jurisdiction to set aside the rapid transit contract described in the amended bill in equity and to enjoin the execution of the same and to enjoin the issue of bonds to raise money to make payments thereunder because of fraud and mistake in the making of said contract.

II. The court erred in holding that it had no jurisdiction of the whole amended bill in equity.

III. The court erred in holding that the statute of the State of New York described in the bill and designated as the rapid transit act was not void as an impairment of the obligation of a contract and consequent forbidden by the Constitution of the United States.

IV. The court erred in holding that the statute of the State of New York described in the amended bill

and therein designated as the rapid transit act did not attempt to authorize the deprivation of the complainants' liberty and property without due process of law and was consequently forbidden by the fourteenth amendment of the Constitution of the United States.

V. The court erred in dismissing the amended bill for want of jurisdiction.

VI. The court erred in refusing to grant the relief prayed in the amended bill.

I.
This Court has Jurisdiction of the Appeal.

> The Evarts Act in §5 gives this Court jurisdiction: "In any case in which the jurisdiction "of the court is in issue; in such cases the question of jurisdiction alone shall be certified to "the Supreme Court for decision; in any case "that involves the constitution or application "of the Constitution of the United States * * * "in any case in which the constitution or a law "of a State is claimed to be in contravention of "the Constitution of the United States." (27 St. at L. 183).

This appeal is taken upon all three grounds. Since the decree sustained the demurrers upon the sole ground that the Circuit Court had no jurisdiction of the bill, no certificate was required. (*Excelsior Pipe* v. *Pacific Bridge Co.*, 185 U. S., 2825.)

The Circuit Court, moreover, has sent up a certificate stating that a question of jurisdiction was at issue.

This certificate, after reciting the demurrers and the proceedings, states that the following questions of jurisdiction are at issue.

II. Jurisdiction of the Circuit Court.

(1) "When a Circuit Court of the United "States decides that the complainants to a bill "of equity brought to enforce an alleged right "which he claims arises under the Constitution "of the United States shows no right arising "under the Constitution of the United States, "has said court jurisdiction to decide and hear "and determine other matters of equitable "cognizance pleaded in said bill, which do not "arise either under the Constitution of the "United States or a statute, or a treaty thereof; "if the complainant and defendant are citizens "of the same state?

(2) "Has this Court jurisdiction of the said "amended bill in equity?" (p. 62 fols. 104, 105).

This seems to show that the Circuit Court understood that so much of the bill as set up matters not arising under the Constitution of the United States was good. It further indicates that the Judge considered the Federal question raised by the bill were sudstantial and not frivolous. Otherwise the certificate would have so stated.

II.
The Circuit Court had Jurisdiction of the Bill.

The statute gives the Circuit Courts of the United States "original cognizance concurrent with the courts of the several States of all suits of a civil nature, at common law or in equity * * * arising under the Constitution laws of the United States." (25 Sts. at L. p. 433).

This suit was brought to enforce and protect rights founded upon those clauses of the Constitution of the

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United States, which forbid the States from impairing the obligation of contracts, from taking property without due process of law and from denying the equal protection of the laws.

The learned Judge was mislead by the cases arising upon writs of error to the State Courts and supposed that the same rules which applied to the appellate jurisdiction of this Supreme Court upon such writs of error limited the jurisdiction of the Circuit Courts in suits of which they have original cognizance. In this he was mistaken.

> In *Swafford* v *Templeton*, 185 U. S. 487, 493, 494; this Court said speaking through Mr. Justice White:
>
> "It results from what has just been said that "the court erred in dismissing the action for "want of jurisdiction, since the right which "it was claimed had been unlawfully invaded "was one in the very nature of things arising "under the Constitution and laws of the United "States, and that this inhered in the very sub- "stance of the claim. It is obvious from an "inspection of the certificate that the court, in "dismissing for want of jurisdiction was con- "trolled by what it deemed to be the want of "merit in the averments which were made in "the complaint as to the violation of the Federal "right. But as the very nature of the con- "troversy was Federal, and, therefore, juris- "diction existed, whilst the opinion of the Court "as to the want of merit in the cause of action "might have furnished grounds for dismissing "for reason, it afforded no sufficient ground for "deciding that the action was not one arising "under the Constitution and laws of the United "States.

II. Jurisdiction of the Circuit Court.

"True, it has been repeatedly held that, on "error from a State court to this court, where "the Federal question asserted to be contained "in the record is manifestly lacking all color of "merit, the writ of error should be dismissed. "But *the doctrine referred to has no application "to a case brought in a Federal court where "the very subject matter of the controversy is "Federal, however much wanting in merit may "be the averments which it is claimed establish "the violation of the Federal right.* The dis- "tinction between the cases referred to and the "one at bar is that which must necessarily exist "between controversies concerning rights which "are created by the Constitution or laws of the "United States, and which consequently are in "their essence Federal and controversies con- "cerning rights not conferred by the Constitu- "tion or laws of the United States, the con- "tention respecting which may or may not in- "volve a Federal question depending upon what "is the real issue to be decided or the sub- "stantiality of the averments as to the existence "of the rights which it is claimed are Federal "in character. The distinction finds apt illustra- "tion in the decisions of this court holding that "suits brought by or against corporations "chartered by acts of Congress are cases *per "se* of Federal cognizance, *Osborn* v. *U. S. "Bank*, 9 Wheat. 817; *Texas & Pacific R. R.* v. "*Cody*, 166 U. S. 606. It may not be doubted "that if an action be brought in a Circuit Court "of the United States by such a corporation "there would be jurisdiction to entertain it, "although the averments set out to establish "the wrong complained of or the defense inter-

"posed were unsubstantial in character. The "distinction is also well illustrated by the case "of *Huntington* v. *Laidley*, 176 U. S. 668, "where, finding that jurisdiction obtained in a "Circuit Court, this Court held that it was error "to dismiss the action for want of jurisdiction "because it was deemed that the record estab- "lished that the cause of action asserted was "not well founded."

The cases are collected in *Riverside & A. Ry. Co.* v. *City of Riverside*, 118 Fed. R., 736, 740, by Wellborn:

"It is essential to Federal jurisdiction under "said constitutional provisions, that there "should really be a valid contract or that the "impaired or deprivation complained of "should really be effected through legislation "or other action of the state, but it is sufficient "if these grounds of suit are claimed in good "faith and not frivolously. *City R. Co.* v. "*Citizens' St. R. Co.*, 166 U. S. 558, 17 Sup. "Ct. 653, 41 L. Ed. 1114; *Illinois Cent.* R. R. Co. "v. *City of Chicago*, 176 U. S. 646, 20 Sup. Ct. "509, 44 L. Ed. 622; *Yazoo & M. V. R. Co.* v. "*Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. "Ed. 395; *Illinois Cent. R. Co.* v. *Adams*, 180 "U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; "*Pen. Mut. Life Ins. Co.* v. *City of Austin*, "168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. "626; *Hamilton Gaslight & Coke Co.* v. *City* "*of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, "36 L. Ed. 963; *Michigan Tel. Co.* v. *City of* "*Charlotte* (C. C.) 93 Fed. 13; *Vicksburg* "*Waterworks Co.* v. *City of Vicksburg*," supra. "808 Fed."

In Pacific Electric Co. v. *City of Los*

Angelos, 118 Fed. R. 746, 752, the same Judge said:

"On the question of jurisdiction, complain-
"ant contends that the proceedings set forth
"touching the street railway franchise in ques-
"tion, up to and including the acceptance ap-
"proval and filing of the bond required by the
"statute, constituted a complete and valid con-
"tract between said city and complainant, and
"vested in the latter said franchise, and that the
"resolution or orders of said council, and the
"other proceedings taken and threatened for
"the purpose of vacating and setting aside said
"contract, are within the prohibitions of section
"10 of article 1 of the constitution of the United
"States, and section 1 of the fourteenth amend-
"ment to said constitution. The writer of this
"opinion has recently (November 1, 1902) de-
"cided a case in this court (*Riverside & A. Ry.*
"*Co.* v. *City of Riverside,* 118 Fed. 736), whose
"jurisdiction features bear such close resem-
"blance to those here presented that the opinion
"in that case may be fittingly adopted in this,
"and for the reason and upon the authorities
"there given and cited, complainant's conten-
"tion here as to a Federal question is sustain-
ed."

He then held: that the complaint had acquired no rights; that no contract had been made between it and the City; and he dismissed the bill upon the merits while he took jurisdiction of the same.

City Railway Co., vs. *Citizens' Street R. R. Co.,* 166 U. S., 557, 563, per Mr. Justice Brown:

"All that is necessary to etablish the juris-
"diction of the court is to show that the com-

"plainant had or *claimed in good faith to have,*
"a contract with the city, which the latter had
"attempt to impair."

All it is necessary to show in order to secure a reversal of the decree is that the complainants claim a franchise and that all of their objections to the constitutionality of the Rapid Transit Act are not so manifestly frivolous and without color of right as conclusively to prove bad faith upon their part. The undisputed fact, that they have spent more than $100,000 in reliance upon the validity of that franchise would seem to establish their good faith. The length of Judge Hazel's opinion seems to show that he considered their claims resious. There is nothing there nor in his certificate to indicate that he thought any of them were made in bad faith or frivolous.

III.

Having jurisdiction of the Federal questions raised by the bill the Court had also jurisdiction of the whole bill including all questions that were not Federal.

(a) As the demurrer was to the whole bill no part of it can be attacked. (*Atwill* v. *Ferrett*, 2 Blatch. 39; *Chicago St. L. N. C. R. Co.* v. *Ferrett*, 2 Blatch, 39; 18 *Story's Eq. Pl.*, §§457, 458.)

(b) The matters pleaded by the complainants which do not depend upon the Constitution of the United States relate to fraud, mistake, corruption and undue influence in the execution of the Rapid Transit Contract. These are other grounds for the same relief that is the object of the appeal to the protection of the Constitution, namely, the cancellation of the con-

tract and an injunction against its enforcement, in which plaintiffs are interested as taxpayer as well as owners of the franchise upon which that contract infringes. Equity abhors a multiplicity of suits.

Interest rei publica ut sit nis litum. The conclusiveness of *res adjudicata* would make a decree dismissing this bill upon the merits a bar to a subsequent suit in the State Court for the same relief, an injunction against the performance of the Rapid Transit Contract, upon any grounds whether pleaded in this bill or not.

> In *Werlein v. New Orleans*, 177 U. S. 390, 399, this Court said, speaking through Mr. Justice Pecktown:
>
> "We think it was the duty of the city to set "up in that suit and to prove any and all "grounds that it had to support the alle- "gation that Klein had no right to seize "or sell the property. The threatened sale "might have been illegal for a number of "reasons, based upon widely divergent facts, "but whatever those reasons were, the fact "upon which they rested were open to proof "in the chancery action, and if the city desired "the benefit of them, they should have been "alleged and proved. It would seem to be quite "clear that the plaintiff could not be permitted "to prove each independent fact in a separate "suit. Suppose the city had only set up the fact "of the registry of the judgment, as a ground "for enjoining the sale, and after a trial on that "issue it had been beaten and judgment had gone "against it, could the city after that have com- "menced another suit for the same purpose, and "set up as a ground for the alleged illegality of "the sale, the assignment of the judgment by

"Klein? In such second action would not the "judgment in the prior action conclude the city? "If not, then on being beaten on a trial of that is- "sue the city could commence still another action "based on the allegation that the judgment had "been paid. Thus, as many different actions "as the city might allege grounds for claiming "the sale would be illegal could be maintained "seriatim, and no one judgment would con- "clude the city except as to the particular "ground upon which the city proceeded in each "particular case. And yet all these different "grounds would simply form evidence upon "which the original cause of action was based, "namely, the alleged illegality of the apprehend- "ed sale. They would form simply separate "facts upon which the cause of action might "rest." (*Cf. Highon Injunctions*, §39, *Bank of U. S. v. Schultz*, 3 Ohio, 6; *Breeze v. Haley*, 11 Col. 357; *Dowell* v. *Appellate*, 152 U. S. 327; *U. S. Trust Co.* v. *New Mexico*, 183 U. S. 535, 543; *In Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 216, 217; S. C. 175 U. S. 109; two suits were brought to obtain the same relief, one founded upon rights claimed under the Federal Constitution and the other upon independent grounds. It was held that a decree dismissing the latter bill was *res adjudicata* against the former. Mr. Justice Brewer said (186 U. S. 216, 217).

"The plaintiff failed to set up in the first suit "all its grounds of relief. Can it be permitted "in this to set up additional grounds and obtain "the very relief sought in the prior suit as well "as additional relief, the same in kind though "longer in duration? Will the law permit the "splitting up into separate suits of different

"grounds for the same relief? Will not the "judgment or decree in the first be held a final "adjudication of the rights of the parties?"

Robinson v. *Brown*, 166 N. Y. 159, 162: "If, "however, the plaintiff is a citizen, and a tax- "payer as well, and brings the action to re- "strain illegal acts and waste on the part of the "municipal officers, we see no reason why he "may not avail himself of any illegal acts, "whether they arise under the Labor Law or "any other statute, for the purpose of main- "taining his action. We do not think that the "allegations contained in this complaint consti- "tute separate causes of action."

U. S. vs. Union Pacific Railway Co., 160 U. S. 1, 51, 52; per Mr. Justice Harlan:

"In 1 Pom. Eq. Jur., Sec. 181, many adjudg- "ed cases are cited in support of the proposi- "tion that if the controversy contains any "equitable features, or requires any purely "equitable relief which would belong to the ex- "clusive jurisdiction, or involves any matter "pertaining to the concurrent jurisdiction, by "means of which a court of equity would ac- "quire, as it were, a partial cognizance of it, "the Court may go on to a complete adjudica- "tion, and may thus establish purely legal rights "and grant legal remedies which would other- "wise be beyond the scope of its authority."

It is well settled that, if there is a single ingredient of Federal jurisdiction in the case, relief may be given upon other grounds although the Federal question is decided adversely to the complainants.

Osborn vs. U. S. Bank, 9 Wheaton 738, 823, per Marshall, C. J. "We think then when a "question to which the judicial power of the

III. Jurisdiction of Questions not Federal.

"Union is extended by the Constitution forms "an ingredient of the original cause, it is in "the power of Congress to give the Circuit "Courts jurisdiction of that cause, although "other questions of fact or of law may be in- "volved in the case, that it involves questions "which do not at all depend on the Constitu- "tion of the United States; but when a ques- "tion to which the judicial power of the United "States is extended by the Constitution forms "an ingredient of the original cause, it is with- "in the power of Congress to give the Circuit "Courts jurisdiction of the cause, although to "other questions of fact or of law may be in- "volved in it. These propositions which are "too firmly established to admit of, or to require "further discussion, embrace the present case."

To the same effect are *Tennessee* v. *Davis*, 100 U. S. 257, 264; *Gold Washing & Water Co.* v. *Keyes*, 96 U. S., 199, 203, per Waite, C. J.: "The suit must, in part at least, arise out "or a controversy between the parties in regard "to the operation and effect of the Constitution "or laws upon the facts involved."

This is not a special rule of practice established for the sole benefit of banks and railway companies chartered by Congress, but it extends to all classes of cases.

New Orleans Waterworks v. *Louisanna Sugar Co.* 125 U. S. 18, 32, 33 per Gray, J.; speaking of *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674; *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64:

"Both those cases were appeals from the "Circuit Court of United States upon which "this court was not restricted to the considera-

"tion of the Federal questions decided below "but had jurisdiction to determine the whole "case."

Omaha Horse Ry. Co. vs. *Cable Tramway Co.*, 32 Fed. R., 727, 729, per Mr. Justice Brewer:

"Both parties are citizens of Nebraska, and "the jurisdiction of this Court was invoked on "the ground that the State of Nebraska had "passed a law impairing the obligation of its "charter contract with the plaintiff. That ques- "tion having been decided against the plaintiff, "defendant insists that the case necessarily went "out of this Court; that the matter of damages "is a question purely under state laws, of which "this Court could not take jurisdiction. It "further insists that the prayer for relief in "plaintiff's bill, being for an injunction, is not "broad enough to include the assessment of "damages. I think the defendant is wrong in "both of these propositions. It is the settled "law of the Supreme Court that, when a case "is presented involving a Federal question, the "jurisdiction of the Court attaches to the whole "case, and is not limited to the mere decision of "that single Federal question, *Tennessee* vs. "*Davis*, 100 U. S., 257; *Railroad Co.* v. *Missis-* "*sippi*, 102 U. S., 135. In the last case Mr. "Justice Harlan, speaking for the Court, says "that it is settled law in that tribunal:

" 'That it is not sufficient to exclude the judi- " 'cial power of the United States for a particu- " 'lar case that it involves questions which do " 'not all depend on the constitution or laws of " 'the United States; but, wherein a question to " 'which the judicial power of the Union is ex-

" 'tended by the constitution forms an ingredi-
" 'ent in the original causes, it is within the
" 'power of Congress to give the Circuit courts
" 'jurisdiction of that case, although other ques-
" 'tions of fact or of law may be involved
" 'in it.' "

To the same effect are *Louisville Trust Co.* v. *Stone* (C. C. A.) 107 Fed. R. 305, 309, 310; *Nashville C. & St. T. Ry.* v. *Taylor*, 86 Fed. R. 168, 178, 188; *Pa. Mut. Life Ins. Co.* v. *Austin*, 168 U. S. 685, 695; *Scott* v. *Donald*, 165 U. S. 58, 71; *Owensburo* v. *Owensburo Waterworks*, (C. C. A.) 115 Fed. R. 318, 320.

IV.

It seems clear consequently, that so much of the bill as seeks relief grounded upon the fraud and mistake in the execution of the Rapid Transit Contract, the breaches of the same by the contractor, its invalidity because it creates a municipal indebtedness beyond the constitutional limitation and because of the consequent technical insolvency of the City of New York, is sufficient to require a decree in the complainant's favor; and for this reason also we are entitled to a reversal.

The Constitution of the State of New York (Art. VIII Section 10) provides:

"No county or city shall be allowed to be-
"come indebted for any purpose or in any man-
"ner to an amount which, including existing
"indebtedness, shall exceed ten per centum of
"the assessed valuation of the real estate of such

IV. Rapid Transit Contract Invalidated by Mistake, Insolvency Etc.

"county or city subject to taxation as it ap-
"peared by the assessment rolls of said county
"or city on the last assessment for state or
"county taxes prior to the incurring of such
"indebtedness; and all indebtedness in excess
"of such limitation, except such as may now
"exist shall be absolutely void."

The bill alleges:

"Prior to the commencement of the construc-
"tion of the underground railroad hereinafter
"described and prior to the attempt to incur on
"behalf of the City of New York, any indebt-
"edness for such construction, the indebtedness
"of the City of New York, exclusive of certi-
"ficates of indebtedness and revenue bonds is-
"sued in anticipation of the collection of taxes
"and exclusive of the issue of bonds to provide
"for a supply of water, exceeded ten per cent-
"um of the assessed value of the real estate of
"the City of New York subject to taxation; and
"the same is now the case. *The said City of*
"New York is insolvent." (p. 20, fol. 34.)

This Court cannot we presume, take judicial notice of any facts in conflict with these allegations. But should it do so, it will remember that for some time during the administration of Mayor Van Wyck public improvements in the City of New York were stopped because its debt limit had been exceeded, and the New York Sun and Times of January 29, 1903, contain a letter from the Coptroller Grout to the Board of Estimate admitting that the City of New York has exceeded its debt limit. In the opinion of the Appellate Division quoted in the bill upon the subject (pp. 21, 22, 26, fols. 35-41), a majority of that Court considered that a determination of this point was unnecessary when the consent to the construction of the

railroad was granted. (23 N. Y. App. Div., 472, 475, 486.) The question consequently was not then decided, nor was this question decided in *Sun Printing & Publishing Co. v. Mayor*, 152 N. Y., 257, S. C. 8 App. Div., 230, 256. Judge Barrett said:

> "It is to be presumed that public officers "will do their duty, and one of their first duties "is to respect and obey the Constitution. The "act is not invalid, because under it the com "missioners might possibly make a contract "which would transgress the provision in ques- "tion, in other words make an illegal contract "in disregard of their duty. The act itself "contemplates nothing of the kind. Nor does "it appear as a matter of fact that such a con- "tract will necessarily follow the due execu- "tion of the act."

The bill further alleges that the Rapid Transit Contract was obtained by fraud and undue influence; was executed under a material mistake by the city officials and that its material conditions have been broken by the contractor. (p. 29-31, fols. 47-51.)

The complainants are taxpayers and are consequently entitled to enjoin this waste of the city funds. (p. 14, fol. 23.)

Such relief is granted by the Federal Courts when sitting in equity independently of the state statutes.

> *Crampton vs. Zabriskie*, 101 U. S., 601, 609, per Mr. Justice Field.

It is well settled, that a bill is not multifarious which joins an insufficient with a good case for equitable relief and that the proper course for the defendants in such a case is to demur to so much of the bill as is insufficient.

> *Story's Eq. Pl.*, Sec. 283.
>
> *McCabe vs. Bellows*, 1 Allen, (Mass.), 269.

V. Inadequate Provision for Compensation.

Snavely vs. Harkrader, 29 Gratt (Va.), 112.
Brown vs. Guarantee Trust Co., 128 U. S., 403.

V.

The statute is also unconstitutional because of its failure to provide adequate compensation for the property of the plaintiffs and others which is taken by the defendant.

The Rapid Transit Act makes no provision for payment for the franchises owned by the complainant, nor for any franchise, which is not appurtenant to land the fee of which is taken under color of the statute (Rapid Transit Act, Sections 45-50; Bill in Equity VIII). As regards other property, it provides (Sec. 47) that on filing the oaths of the commissioners of appraisal:

> "On filing said oath * * * the said city "shall be and become seized and possessed in "fee or absolute ownership of all those parcels "of property, rights * * franchises, easements "or privileges, which are to be acquired, and "also shall become seized and possessed of all "the rights, terms, franchises, easements or "privileges appurtenant to any lots or parcels of "property indicated on the said maps or plans * "* * and the said Board for the said City "may immediately or at any time or times there-"after take possession or enter into the enjoy-"ment of the said property," &c.

There is no provision for any payment previous to the vesting of the title in the city, and its entry into possession of the property. All that is given to the property owners is the right to recover from the city such damages as may be awarded subsequently

by the commissioners of appraisal, or, in case of their failure to make such report within eighteen months, a suit for damages.

But the demurrer admits the following allegations in the bill.

> "*The said City of New York is insolvent.*
> "Any indebtedness and any claim against the "City of New York attempted to be created for "the benefit of property holders upon the route "of said underground railroad will be, and any "such indebtedness or claim heretofore sought "to be created on their behalf is and has been "null and void for the reason that the same is "and has been forbidden by the said article of "the Constitution of the State of New York "hereinbefore quoted," (p. 20, fol. 34, p. 11 of the bill;

p. 27 of this brief namely, Article VII, Sec. 10, which provides that all the indebtedness of a city or county in excess of ten per centum of the assessed value of the real estate therein subject to taxation "shall be absolutely void."

This question was not raised by the pleadings nor the evidence in *Sun Printing and Publishing Association vs. Mayor*, nor was it mentioned by the Court of Appeals in 152 N. Y., 257.

> See the opinion of *Barrett, J.*, (p. 8 App. Div. 254, quoted under Point 18).

That suit was brought before the consolidation of Greater New York, and then the city had not exceeded its debt limit.

> *Mills on Eminent Domain*, 2d Ed., p. 285, §126:
> "If the municipal corporation is so hampered "in its taxing power that the damages could "not be paid within a reasonable time, an in-"junction would be granted until security is "given to meet the damages."

V. Inadequate Provision for Compensation.

Randolph on Eminent Domain, §292, p. 268:

"There is not good security if the corporate "power of taxation is inadequate to supply "sufficient funds."

Keene vs. Bristol, 26 Pa. St., 46, 47, 48:

"Ordinarily the power of taxation which is "given to municipal corporations is adequate "security to the citizen for his property which "may be taken in opening streets for public use. "No other security need be required in the act "of the General Assembly giving the corporate "authorities power to open streets. Where, "however, it is clearly shown that the power "of taxation is inadequate within a reasonable "time to pay the damages likely to be occasion-"ed, we have no doubt that it is the right and "duty of this Court to interfere, when properly "called upon, and prevent the property from "being taken or the damages from being done "until adequate security is given. The present "is a case which requires such interference. The "power of taxation in the borough of Bristol "is so limited that the amount of damages like-"ly to be occasioned to the complainant's land "in all probability could not be paid out of the "public treasury of said borough within any "reasonable time."

Sage vs. City of Brooklyn, 89 N. Y., 189, 195, 196, per Andrews, C. J.:

"It is so axiomatic, that it is laid up as one "of the principles of government, that a pro-"vision for compensation is an indispensable "attendant upon the due and constitutional ex-"ercise of the power of depriving an individual "of his property under the right of eminent " domain (*Gardner v. Villiage of Newburgh*, "2 Johns. Ch., 168). The Courts in constru-

"ing the constitutional guaranty have departed "from what may seem its plain and natural "meaning, and have held that the payment for "property taken *in invitum* for public use need "not be concurrent with the taking, but that it "is sufficient if the law authorizing the taking "also provides a sure, sufficient and convenient "remedy by which the owner can subsequently "coerce payment by legal proceedings. If such "provision is not made, then, as was said by "Nelson, Ch. J., 'the law making the appro-" 'priation is no better than blank paper'" (*People ex rel. Utley v. Hayden*, 6 Hill, 359).

Bloodgood vs. Mohawk & Hudson R. R. Co., 18 Wend. (N. Y.), 9, 17, 18;

Kennedy vs. Indianapolis, 103 U. S., 599, 603;

Connecticut River R. R. Co., vs. Franklin Co. Commrs. 127 Mass., 50, 52, 54, 55, 56;

Baltimore & Susquehanna R. R. Co. vs. Nesbit, 10 How. (U. S.), 395, 398, 399;

Boston & Lowell R. R. Co. vs. Salem & Lowell R. R., 2 Gray (Mass.), 1, 37;

Haverhill Bridge Proprietors vs. Essex Co. Commrs., 103 Mass., 120, 124;

Brickett vs. Haverhill Aqueduct Co., 142 Mass., 394, 396;

VI.

The statute is void, because it is an attempt to use public funds for a private use, and consequently to take the property of the taxpayers without due process of law.

Had the legislature the power to authorize the City of New York to build and operate a railroad? This is a question of the utmost importance that sooner or

later, if the present progress of legislation in the direction of socialism continues, will come before this Court for adjudication. If any one of the other positions taken in this argument is correct, there is no need of its decision at the present time since the decree below should be reversed upon other grounds. If not, however, it is in the case, and the Court, if it affirms the decree, must finally approve all legislation of that character; which will change the whole nature of our government. The argument in its support is that, because the State may regulate the management of railroads, therefore, it may operate them. If this were so, still it would not justify the imposition of this burden upon the City of New York alone. But the argument, if admitted, proves too much, for it logically implies authority on the part of the State to engage in almost every kind of business: to build and manage hotels and tenement houses, theatres and grain elevators, to act as a plumber. It logically implies the power of the United States to build and operate all railroads that engage in interstate commerce—and what railroad does not? To engage in every sort of business that is affected by the functions of the national government; even as was demanded by the Democratic party in New York during the last campaign, to mine and sell coal.

Since we consider this case should be decided without passing upon this great question, we shall make no elaborate argument in writing upon the subject, but merely call attention of the Court to a few of the leading authorities. In view of these, *can this point be considered so frivolous as to be manifestly beyond the jurisdiction of the Courts of the United States?*

In case of a statute authorizing the expenditure of municipal funds for a private purpose, under the Fourteenth Amendment, the Federal Courts decide as to its validity independently of the state decisions.

VI. Public Money Expended for Private Use.

(*Loan Association vs. Topeka*, 20 Wall., 655; *Sutherland-Innes Co. v. Village of Evart*, 86 Fed. R., 597; *Cole v. Lagrange*, 19 Fed. R. 871.)

That such a use of public funds is unconstitutional, seems to have been the opinion of this Court in *Pleasant Township vs. Ætna Life Ins. Co.*, 138 U. S., 67.

It has been held that a State cannot build a grain elevator.

Rippe v. Becker, 56 Minnesota, 101, 111, 112, 117:

"The position of defendants' counsel really "amounts to this: That whenever those who "are engaged in any business which is affected "with a public interest, and hence the subject "of governmental regulation, do not furnish "the public proper and reasonable service, the "state may, as a means of regulating the busi-"ness, itself engage in it, and furnish the public "better service at reasonable rates, or, by means "of such state competition, compel others to "do so.

"The very statement of the proposition is "sufficient to show to what startling results it "necessarily leads. It needs no argument to "prove that if, in the exercise of the police pow-"er to regulate this business, the state itself "has a right to erect and operate one elevator "at Duluth, it has the power to erect and oper-"ate twenty, if necessary at the same point, and "also to erect and operate elevators at every "point in the state where there is grain to be "handled and stored.

"Railways are also, under this same police "power, the subjects of state regulation; and if "it should be deemed that they were not fur-

"nishing the public with proper service, or "charging unreasonable rates, it could with "equal propriety be claimed that it would be "a proper means of exercising the police power "of regulating the business for the state itself "to construct and operate competing railways. "The hack business, the pawnbrokers' business, "the manufacture and sale of intoxicating liq- "uors, and numerous other kinds of busi- "ness that might be named, are also "the subjects of State regulation, and, "if counsel's contention is correct, we do "not see why, as a means of 'regulating' these "kinds of business the state itself might not "engage in running hacks, pawnbrokers' shops, "building and operating distilleries and brewer- "ies, or even running saloons. But further il- "lustration cannot be necessary. The police "power of the state to regulate a business does "not include the power to engage in carrying "it on."

* * * * * * *

"It would leave the state, through its legis- "lature, at liberty, in every period of inflation "or excitement, to embark in any and every "other sort of enterprise, outside of its legiti- "mate governmental functions, which might be "deemed of public benefit. It would admit, not "only of building grain elevators, but also of "engaging in schemes of drainage, irrigation, "developing water powers, building public "gristmills, public creameries and cheese factor- "ies, establishing stock yards and packing "houses, and other like enterprises, almost with- "out limit."

In People v. Township Board of Salem, 20 Mich., 452, 478, per Cooley, J.:

VI. Public Money Expended for Private Use.

"The sovereign power of taxation is em-
"ployed in a great many cases where the power
"of eminent domain might be made more im-
"mediately efficient and available, if constitu-
"tional principles could suffer it to be resorted
"to; but each of these has its own peculiar and
"appropriate sphere, and the object which is
"public for the demand of the one is not neces-
"sarily of a character to permit the exercise of
"the other."

Sun Publishing Assn. v. Mayor, 8 App. Div., 230, 261, 263, per Ingraham, J.:

"The intent of this act is apparent. Under
"its provisions a board of Rapid Transit Rail-
"road Commissioners, appointed by the Legis-
"lature are authorized to construct in each city
"of the state containing more than 1,000,000
"inhabitants, a railroad, upon a majority of the
"electors of such city voting in favor of such
"construction, and with the consent of certain
"local authorities. That the vote and the con-
"sent of certain local authorities having been
"once given, the nature of the railroad, its ex-
"tent, its cost, the terms of the contract under
"which it shall be constructed, and the parti-
"cular contractors who shall be employed, are
"to be determined by the said board, over
"whom the municipal authorities have no con-
"trol. As part of the contract for construction,
"the board must make a lease of the railway,
"when completed, to the contractor for a per-
"iod of at least thirty-five years. As to the
"terms of that lease and the rent to be paid, the
"city acquire the possession, use, occpation of,
"ance of that lease, by no possibility can the
"city acquire the possesion, use, occupation of,

"or any power or authority over the road. In "case the contractor shall fail to pay the rent "or fulfill the conditions of the contract, it is "the Board of Rapid Transit Commissioners "who take possession of the road, and either "operate it themselves or lease it to others to "operate, with no power in the city to regu- "late the conditions or terms, or rent to be re- "ceived. In such case the power of the Board "of Rapid Transit is unlimited, as in case of "such failure on behalf of the contractors, the "Rapid Transit Commissioners may either "operate the road or lease it to others for such "price as they may fix in their discretion. And "by the express terms of the statute this "contract may provide for renewal or "renewals of such lease, so that the "lease may be a substantial perpetuity, "with no right of the city to obtain any "control over, or possession of the property, or "any right of any kind over it except to receive "rent that the Rapid Transit Commissioners "may deem best to impose upon the contractors. "No officer of the city, nor the municipal cor- "poration itself, under such a lease would ever "acquire the possession or control of the prop- "erty; nor would the city have the right to have "any voice in fixing the rate of fare to be "charged. That also is to be provided for in "the contract at such an amount as the Rapid "Transit Commissioners shall fix. After that "contract is made, neither the city nor the state "could alter the rates of fare which these Rapid "Transit Commissioners shall fix as the fare to "be charged by such contractors. All that the "city can do and what the city is bound to do "is, to pay the sum fixed by the Rapid Transit

"Commissioners as the price to be paid to its "contractor that they may select regardless of "the amount of his bid, and all such further "sums as shall be necessary to acquire such "property as the Rapid Transit Commission- "ers shall certify to be necessary for the proper "construction, operation or maintenance of the "road and such further sums as will be sufficient "to pay all damages sustained by any one in "consequence of such construction, operation "and maintenance of the road. The statute it- "self, while contemplating the payment of many "millions of dollars by the city, provides no "safeguard for the prevention of claims by the "contractors or others for payments outside of "the contract, but in the broadest way imposes "upon the city liability for damages that the "construction or operation will entail, with no "provision for the re-payment of such damages "by any one, leaving the city thus absolutely at "the mercy of the contractors or others who "sustain damages by reason of the construc- "tion or operation of the railroad. And even "this is not all, for by the provisions of the stat- "ute, the Rapid Transit Commissioners, with "the consent of the contractor and his surety, "may modify the contract in any respect, and "thus, without the consent of the city, impose "additional burdens upon it. It is only neces- "sary to read the remarks of Peckham, J., in "delivering the opinion of the Court in *O'Brien "v. The Mayor,* (139 N. Y., 543) to appreci- "ate the possible effect of this omission upon "the City of New York."

(*Ibid.*, pp. 265, 266): "Can it be a city pur- "pose to acquire property which is to be used

"by an individual or corporation for profit, "over which neither the city nor its citizens "can have control, the use of which they can- "not regulate, and where they can have no "authority to impose the terms upon which it "is to be used by others? Can it be a city pur- "pose to invest $55,000,000 in property which "by a very possible contingency, may be oper- "ated or leased so that no return at all shall be "paid to the city for its use, the city or its "citizens being powerless to obtain possession "of or in any way control or use it, and from "which by means of a contract uncontrolled "by the municipal corporation, the person in "possession can exclude every one of the citi- "zens of the city except upon payment to him "of a fee, the amount of which neither the city "nor its citizens can control? * * * *

"Does it avoid the prohibition to say that "the legal title vests in the City of New York "when the beneficial use and profits of the prop- "erty are vested in another perpetually? Un- "der this contract who is to get the benefit if "this road becomes a profitable undertaking, "where large profits will be made by the oper- "ation of the road? Not the city. It never can "receive more than the rent reserved to it by "the contract between the Rapid Transit Com- "missioners and the contractors. Who is to "bear the burden if the undertaking prove a "failure? Clearly the city, except so far as "it is protected by the giving of the bond, the "amount of which is entirely within the dis- "cretion of the Rapid Transit Commissioners. "And all through this act it is clear that the

"Legislature was not thinking of the welfare of "the city, was not thinking of this as a city pur- "pose or city use."

* * * * * * *

(p. 272): "The construction and operation "of a railroad is not the only business that has "been recognized by the law as being of pub- "lic interest, or as having more or less a pub- "lic character. Thus, the establishment of an "elevator for the purpose of loading vessels "with grain has been so considered (*People v.* "*Budd*, 117 N. Y., 1). Also the operation and "maintenance of a theatre. (See *People v.* "*King*, 110 N. Y., 418.) And the power of "the Legislature to control the keepers of hotels "or inns has been frequently applied, on the "ground that this use of their property was "'effected, with a public interest;' and if the pub- "lic character of the business, or use to which "the property is put controls, I can see no rea- "son why the City of New York should not be "compelled to erect hotels to be used for the "accommodation of guests, theatres to be used "for the amusement of its citizens, elevators "to be used by the railroads for loading grain "from their cars, stage or cab lines for the car- "rying of passengers or for almost any use or "purpose which is required for the convenience "or amusement of the people."

(*Ibid. Per Rumsey, J.*, pp. 286, 287): "This "power must stand, if at all, upon the "broad proposition that it is within the prop- "er scope of the duties of a municipal corpor- "ation to do within the limits of the city what- "ever may add to the convenience of any large "portions of the citizens in the transaction of

"their business, or which will to any consider-
"able extent increase the value of any portion
"of their property. Indeed as I understand
"the opinion of the majority of the Court, this
"is said to be a city purpose solely upon the
"ground that it tends to the convenience and
"comfort of a large portion of the inhabitants,
"in the transaction of their business, and it be-
"comes important because, at present, private
"persons cannot be induced to undertake it.
"But the fact that the thing which ordinarily
"should be intrusted to private enterprise and
"which has heretofore always been so intrust-
"ed may, to some extent, partake of a public
"character because it promotes the convenience
"or prosperity of a municipal corporation, has
"not been supposed to invest that enterprise
"with such a public nature as to authorize muni-
cipal corporations to undertake it. (*Weismer
"v. Village of Douglas*, 64 N. Y., 91; *Hay v.
"Cohoes Co.*, 3 Barb., 42; *Memphis Frt. Co.
"v. Memphis*, 4 Cold. (Tenn.), 419; *Gardner
"v. Newburg*, 2 Johns. Ch., 161; *Matter of N.
"F. & W. R. Co.*, 108 N. Y., 375.) These
"authorities are a complete answer, as it seems
"to me, to the proposition upon which the con-
"stitutionality of this act is made to stand.

"As is said by Judge Dillon: 'To clothe
" 'them (these corporations) with power to ac-
" 'complish purpose which can better be left to
" 'private enterprise is unwise. Their chief
" 'function should be to regulate and govern.
" 'To invest them with power of individuals
" 'or private corporations for objects not per-
" 'taining to municipal rule is to pervert the
" 'institution from its legitimate ends and to

"'require of it duties it is not adapted to sat-
"'isfactorily execute.' (*Dillon on Mun. Corp.*,
"§12.)"

"It is conceded that this act is a departure
"from, and an advance beyond all previous
"legislation, in that it gives to the cities men-
"tioned in it powers which they have not here-
"tofore exercised. It seems to me, as I have
"endeavored to show, that this power is not
"only outside the ordinary range in which mu-
"nicipal corporations have thus far acted, but
"it extends their powers further than can be
"justified by any fair construction of our Con-
"stitution, and certainly further than ever has
"been done before. This whole legislation is
"fraught, as I believe, with danger to the com-
"monwealth, because the necessary effect of it
"cannot be otherwise than to draw within the
"power of the legislature, and to impose upon
"the state and city authorities, the manage-
"ment and control of every agency which can
"in any way tend to the convenience of the peo-
"ple, or which can be supposed in any way to
"advance their prosperity."

See *In re Municipal Fuel Plants (Mass.* 1903) 66 N. E. Rep. 24.

VII.

The act is further void because it takes the property of the complainants without due process of law; since it subjects them to the payment of taxes for the expenses of officers not elected by the people, nor appointed by representatives of the people, and makes them subject to the authorty of such officers who are authorized to regulate the complainants' business, to control and lease a railroad which is the city's property and to spend the municipal funds.

The Rapid Transit Act (§ 1 quoted, *supra*, p. 9) appointed as municipal officers six persons, whom the act named, besides the Mayor and Comptroller of the city, and the President of the Chamber of Commerce, who is an official of a private corporation. If, as the defendants claim, this is a general, and not a local law, the statute appointed six persons residents of the City of New York municipal officers of other cities—one of the most flagrant instances of a denial of the right of local self-government that can be found in the statute books. The act, moreover, provided that vacancies in the board "shall be filled by a majority vote "of the remaining members of said board." Three of the defendants have been elected by the survivors of the original board to fill vacancies therein. "Four "members of the board shall constitute a quorum for "the transaction of business." (§ 3.)

> "§10. *The board of estimate and apportion-*
> "*ment* or other board or public body on which
> "is imposed the duty, and in which is vested the
> "power, of making appropriations of public
> "moneys for the purposes of the city govern-

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VII. Composition of Board Unconstitutional.

"ment in any city in which it is proposed to "construct railway or railways *shall, from time "to time, on requisition duly made by the "Board of Rapid Transit Railroad Commis- "sioners, appropriate such sum or sums of "money as may be requisite and necessary to "properly enable it to do and perform, or cause "to be done and performed, the duties herein "prescribed, and to provide for the compensa- "tions of such commissioners,* and such appro- "priation shall be made forthwith upon presen- "tation of a requisition from the Board of Rapid "Transit Railroad Commissioners, which shall "state the purposes for which such moneys are "required by the said board. In case the said "Board of Estimate and Apportionment or such "other board or public body fail to appropriate "such amount as the Board of Rapid Transit "Railroad Commissioners deem requisite and "necessary the said Board of Rapid Transit "Commissioners may apply to the General "Term of the Supreme Court, in the department "in which the railway is to be or has been con- "structed, on notice to the Board of Estimate "and Apportionment, or such other board or "public body aforesaid, to determine what "amount shall be appropriated for the purposes "required by this section, and the decision of "the said general term shall be final and con- "clusive; and no city shall be liable for any in- "debtedness incurred by said board of rapid "transit railroad commissioners in excess of "such appropriation or appropriations. It shall "be the duty of the auditor and controller of "any such city, after such appropriations shall "have been made, to audit and pay the proper

"expenditures and compensation of said com-
"missioners upon vouchers therefor to be fur-
"nished by said commissioners."

The Legislature has thus created a close corporation, with power to dispose of the municipal property, to regulate the business of corporations, and to incur expenses which must be met by taxation, in all the cities of the State that possess more than a million inhabitants, with no power on the part of the people of those cities to control the board. All vacancies are to be filled by the choice of the board, and in a short time a majority thereof will consist of members thus chosen. This is forbidden by the Constitution of the State of New York (Art. X., Sec., 2). Nor is such a method of election by a board of its own membership "a Republican Form of Government" such as the United States guarantees to the State of New York, (Constitution, Art. IV, Sec. 4). And it is not due process of law (XIV Amendment).

The character of the persons named cannot affect the constitutionality of the act. Suppose that the New York State Legislature should enact that certain specified persons together with the Mayor and the Controller of New York City should constitute a police board or other municipal commission with power to spend the municipal funds and to fill vacancies in their number, and that the persons selected were the Sachems of Tammany Hall or the executive committee of the Republican organization in such city; would this court hold such a statute to be valid? Even if it had been sustained by a State court divided upon party lines? But the New York Court of Appeals has not yet had this defect in the Statute brought to its attention. When the *Sun* case was brought, no vacancies in the Board had been filled. If the legislature may allow a close corporation of this character to spend part of the city's funds, it may substitute such a

board for the present Board of Estimate and thus authorize all the city's money to be appropriated in this manner. It may transfer the control of the police, the firemen, the schools and all other municipal departments to the same or to a similar Board. *Is this point too frivolous as to be manifestly beyond the jurisdiction of the Federal Courts?*

In *Fox vs. Mohawk and Hudson River Humane Society*, 165 N. Y. 517, 525, the Court of Appeals held that a similar provision in a statute was unconstitutional, speaking through Judge Cullen: "That the agents or "officers of the corporation are appointed such "by the corporators and that, if such agents "are invested by virtue of their agency alone "with the power of public officers, it is in sub-"stance devolving the choice of public officers "on a few of the citizens, and possibly persons "not citizens, while, under the Constitution, all "public officers must be elected or appointed by "other public authorities, and thus trace their "title to power and authority either immediately "or mediately back to the people. (see *Ames vs.* "*Port Huron, Etc., Co.*, 11 Mich., 139; *State* "*vs Kennon*, 7 Ohio. St. 547; State *ex rel.* "*Clark vs. Stanley*, 66 N. Carolina, 59)."

In *Rathbone vs. Wirth*, 6 App. Div., 277, "308, per Herrick, J. (Affd. 150 N. Y., 459), *Held*, that a bill is unconstitutional which is "an infringement upon the right of the majority "to select their own officers, either immediate-"ly by election, or by their accredited agents, "and is destructive of the principle of local "self-government."

S. C., 6 App. Div. 285, 286: "Suppose the "legislature should see fit to create a new county

"office, and should provide that, at the general "election for the election of State officers, "the person for whom the next highest "number of ballots should be cast for "such office, should thereafter dicharge the "duties thereof. A new office is created "which the legislature has a right to create, and "also to determine the method of filling it. "There is nowhere any express prohibition "against legislation of that character in the "constitution, and yet what man will say that "an act of that kind would stand for a moment, "not because it is in conflict with any express "provision of the constitution, but because it "is repugnant to its whole spirit and intent."

State ex rel White v. Barker, (Ind. Sup. Ct., 1902), 89 N. W. Rep. 204, 208; "Having then, a proprietary and private "interest in its waterworks system, grant- "ed to it by the legislature, or incident "to its power to acquire and hold prop- "erty, the question recurs, may the management "and control of this property be taken out of "its hands by the legislature, and invested in "trustees appointed by the district court; especi- "ally where, as in this case, the trustees so ap- "pointed are in no respect responsible to the "appointing power, and are not required to "make reports thereto? We think not. If the "city were a mere private corporation, it would "need no argument to show that the legislature "could not take the management of its prop- "erty out of the hands of its officers and di- "rectors, and place it in the custody and control "of officials, even if they be stockholders, select- "ed by persons who had no interest in the corpo-

"ate entity, and who were in no manner re-
"sponsible to those interested in the welfare of
"the organization. Such divesture of prop-
"erty, or, what is the same thing, of its manage-
"ment and control, would be unconstitutional
"and void. The same rules have been applied
"to property held by a municipal corporation
"in its private and proprietary capacity. See
"case heretofore cited, and *Dill. Mun. Corp.*
"(4th Ed.) Sects. 68, 68a, 69. *Orr v. Bracken*
"*Co.*, 81 Ky. 593; *Small v. Inhabitants of Dan-*
"*ville*, 51 Me. 359; *Western College v. City of*
"*Cleveland*, 12 Ohio St. 375; *Oliver v. City of*
"*Worcester*, 102 Mass. 489, 3 Am. Rep. 485;
"*DeVoss v. City of Richmond*, 18 Grat. 338,
"98 Am. Dec. 647; *Niles Waterworks v. City*
"*of Niles*, 59 Mich. 311, 26 N. W. 525; *Com-*
"*missioners v. Duckett*, 20 Md. 468; and cases
"heretofore cited. This view appears to us to
"be based on the soundest of reasons, and to be
"supported by the weight of authority."
(*People v. Hurlburt*, 24 Mich. 44).

State ex rel. Geake v. Fox (Ind. Sup. Ct. 1902, 63 N. E. 19); *Held* that a statute authorizing the appointment by the governor of a board to control the municipal fire department, is an unconstitutional interference with the right of the municipality to self-government.

VIII.

The filing of maps and profiles of their routes in the offices of the register and county clerk gave to the Central Tunnel Railway Company, and its successors, these complainants, a vested and exclusive right to construct and operate a railroad on the lines which they had adopted. The State contracted that no one else should build a railroad there.

In *Rochester, H. & L. R. R. Co. vs. N. Y., L. E. & W. R. R. Co.*, 44 Hun, 206, 210, the General Term of the Supreme Court said, speaking through Barker, J.: "Under the gen-"eral railroad act, when a corporation has been "organized in compliance with the conditions "of the statute and has made a map and profile "of the route intended to be adopted by the "company, duly certified and filed as required "by the twenty-second section, it has acquired "*a vested and exclusive right to build, construct "and operate a railroad on the line which it has "adopted.*"

This decision and opinion were affirmed and approved by the New York Court of Appeals.

In *Rochester, H. & L. R. R. Co. vs. The N. Y., L. E. & W. R. R. Co.*, 110 N. Y., 128, 132,-134, when that Court said, speaking through Judge Gray:

"We think the General Term were right in "the view they took of the matter. The plain-"tiff, by its organization under the general rail-"road act of 1850, became possessed of the "franchise to construct and operate a railroad "between the terminal points named in its

"articles, over such a line of route as it should "elect. When the initial steps pointed out in "the twenty-second section of the act had been "taken, there only remained for the plaintiff to "acquire, through purchase or through proceed-"ings *in invitum*, the right of way over the "lands through which the line of route had been "surveyed. By the terms of that section, every "company formed under the act, before con-"structing any part of its road through any "county, must make and file a map and profile "of the route intended to be adopted, and must "give a written notice to all occupants of the "land affected of the time and place of filing, "and that the route designated passes over the "land of such occupants.

"Clearly, there is involved in these provisions "the intention of the legislature that, after the "initial proceedings have been taken, which the "statute points out as the first action of the new "corporation, the lands over which the com-"pany's route is located shall be subjected to the "right of the company thereafter to construct "thereon. The legislative scheme contemplates "the determination of the line of route to be in "the discretion of the company, to be exercised "in the mode prescribed by law, and its exer-"cise, when in good faith and within the limits "of its corporate powers, is only reviewable by "the court in the case of an application by an "occupant or owner of lands feeling aggrieved "by the proposed location of the road. This "right to locate its line of road at its election "is delegated to the corporation by the sovereign "power; as is the right subsequently to ac-"quire, *in invitum* the right of way from the "landowner and any land needed for the opera-

"tion of its road. In this sovereign power is "the source of the franchise which the corpora- "tion possesses to construct and operate a rail- "road, and its grant is for public, and not for "private, purposes. Public considerations enter "into the grant of the franchise, and public "policy favors the enterprise for the public con- "venience and use. When, therefore, a corpora- "tion has made and filed a map and survey of "the line of route it intends to adopt for the con- "struction of its road, and has given the re- "quired notice to all persons affected by such "construction, and no change of route is made, "as the result of any proceeding instituted by "any landowner or occupant, in our judgment "it has acquired the right to construct and oper- "ate a railroad upon such line; exclusive in that "respect as to all other railroad corporations, "and free from the interference of any party. "*By its proceeding it has impressed upon the "lands a lien in favor of its right to construct, "which ripens into title through purchase or "condemnation proceedings.* We could not "hold otherwise without introducing confusion "in the execution of such corporate projects, "and without violating the obvious intention "of the legislature. The plaintiff's franchises "were invaded and its enjoyment of the statu- "tory privileges disturbed by the action of the "defendant company in so building tracks upon "plaintiff's line of route as to obstruct and in- "terfere with its proposed construction. The "remedy by injunction was clearly available to "the plaintiff on principles of equity jurispru- "dence."

That such a right is a contract right and a right of property, which are protected by the Constitution of

the United States, is held by the same Court in *People vs. O'Brien*, 111 N. Y., 1, and other cases.

In *Suburban Rapid Transit Co. vs. Mayor*, 128 N. Y., 510, 519, the Court of Appeals said, speaking through Judge Gray: "When the "route or routes were located upon which the "roalroad of the new corporation should be con- "structed, what other legal effect could follow "except a subjection of the land affected to this "species of public use as through the exercise "of paramount right? The subsequent pur- "chase or condemnation of the title to the lands "in the course of the railroad construction was "merely incidental, and was necessary in order "to compensate property owners for the land "taken, and to effect a transfer of the legal title. "The right which the plaintiff acquired to con- "struct and operate a railroad upon the route "described in its articles of association lacked "nothing for its efficacy or completeness. It "had become an obligation, and was one of the "unalterable conditions and a fixed public "feature of the corporate existence. * * * *How "can a franchise so conferred by the legislature "be deemed inchoate and defeasible? Is not "its possession an element of the security upon "which capital has been subscribed and loans "have been made to the Company?* * * * I think "we must conclude that the statutory proceeding "which resulted in the organization of the plain- "tiff's corporation had the effect of vesting in "it the absolute and exclusive franchise to build "upon the route located for it, and to the use "of which the lands were devoted through the "exercise of the paramount right of the sover- "eign power, which franchise was unimpaired "with respect to the right to take and use the

"land in question by the fact that the work of "actual construction had not reached it at the "time the legislature passed the act for the new "parks."

That priority in filing the map gives a priority in right of way is held in: *Morris, & E. R. R. Co. vs. Blair,* 9 N. J. Eq., 635; *A. T. & S. F. R. R. Co., vs. Mecklin,* 23 Kansas, 167, 170; *Boston and Maine R. R. vs. Lowell and Lawrence R. R. Co.,* 124 Mass., 368, per Gray, C. J.; and the Congressional Land Grant Cases: *United States vs. Oregon and California R. R. Co.,* 176 U. S., 28, 50; *Northern Pacific R. R. Co. vs. Sanders,* 166 U. S., 620; *Sioux City R. R. Co. vs. Chicago R. R. Co.,* 27 Fed. R., 770; *St. Paul & Pac. R. R. Co. vs. Northern Pac. R. R. Co.,* 139 U. S., 1, 18; *Van Wyck vs. Knevals,* 106 U. S., 360, 366; *Buttz vs. N. Pac. R. R. Co.,* 119 U. S., 55, 71, 72; *Kansas Pac. Ry. Co. vs. Dunmeyer,* 113 U. S., 629; *Walden vs. Knevals,* 114 U. S. 373.

People vs. Adirondack Co., 160 N. Y. 225; *Adirondack Railway Co. vs. New York,* 176 U. S. 335; does not overrule the former cases, nor lay down different rules.

Before the Adirondack Railway Company had filed a map and profile specifying the route over the property in question, the Constitution of the State had ordained (Art. VII., Section 7):

"The lands of the State, now owned or here- "after acquired, constituting the forest preserve "as now fixed by law, shall be forever kept as "wild forest lands. They shall not be leased, "sold or exchanged, or be taken by any corpora- "tion, public or private, nor shall the timber "thereon be sold, removed or destroyed."

The map was not filed by the railway company until September 18th, 1897, and the notices were served September 23, 1897 (176 U. S., 345). Previously, May 15, 1895, an act was passed providing for the ac-

quisition of this property by the Forest Preserve Board for the Adirondack Park. *The act of April 8th, 1897* (Ch. 220, Vol. 1, p. 93), which was also *passed before the map was filed*, "to provide for the acquisition of land in the territory embraced in the Adirondack Park, and making an appropriation therefor," provided specific regulations for the manner in which the board should acquire and pay for the land in question.

On August 6th, 1897, after negotiations with the owners, the Forest Preserve had contracted for the purchase of the same at a specified price, thus acquiring an equitable right thereto; and on August 15th possession of the land was taken by the Board (160 N. Y., 232-233). The railway company did not file its map and profile until September 18th, 1897, after these proceedings had been taken. Moreover,

> "the map was filed in 1897, when the defend-
> "ant had nine hundred and eighty-five years of
> "corporate existence before it, and it had then
> "been relieved by the action of the Railway
> "Commissioners from the obligation of extend-
> "ing its road. If a lien upon the real estate thus
> "covered by the map, it was good for the length
> "of the period named and was virtually a per-
> "petual incumbrance placed upon property
> "which impaired its value by hindering as well
> "as preventing improvements, and yet *the hold-*
> *"er of the lien was neither obliged to do any-*
> *"thing by virtue thereof for the benefit of the*
> *"public nor even to compensate the owner. No*
> "action had been taken or *money expended* to
> "extend the road when the State acted" (160 N. Y. 242).

We have spent more than $100,000 (Bill, p. 3, fol. 11; p. 16, fol. 61; p. 17, fol. 67); *and we can be compelled by mandamus to build and operate* our railroad. road. There was *in the Adirondack case no rec-*

iprocity between the State and the railway company; no consideration on the part of the latter, and, hence, no contract between it and the State. Under these circumstances, it was held that, as against the State, which had previously manifested its intention to appropriate the property, the railroad acquired no vested right to the lands specified on its map. Judge Gray said:

> "The act of 1897, under which the forest "preserve board acted, was constitutional, and "the state acquired the land in question by the "exercise of a power which superseded any lien "the defendant might have obtained by the "initiatory steps taken" (160 N. Y. 248).

When the act of 1897 was passed, the map had not been filed. Judge Vann said:

> "The effect of the map when filed was to give "warning to other railroads that a certain route "had been preempted by the defendant. It "established no right against the owner, because "the Constitution forbids it; it established none "against the state, because its power is "paramount; but, *as against all other railroad "companies and as against all other creatures "of the state empowered to use the right of "eminent domain, it gave the exclusive right to "occupy that particular strip for railroad purposes until the legislature authorized it to be "devoted to some other public use.* The general "language used in certain cases relied upon by "the defendant should be read in the light of the "facts then before the Court (*Rochester H. "& L. R. R. vs. N. Y., L. E. & W. R. R.*, 110 "N. Y., 128; *Suburban Rapid Transit vs. Mayor, Etc.*, 128 N. Y., 510). These cases simply "involve controversies between the corporations "created by the state as to a located line, and

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> "the legislation necessary to enable one corpora-
> "tion to condemn land previously condemned
> "by another and the like. The state was not a
> "party to any of them, and the only question in-
> "volved was as to which corporation was ahead.
> "The so-called lien was simply an exclusive
> "right of one of two contending railroad corpor-
> "ations as against the other to build a road on a
> "certain piece of land or of a railroad corpora-
> "tion to hold land already condemned for public
> "use as against a city seeking to condemn it for
> "another public use without special authority
> "from the legislature. The general effect of
> "filing a map was not involved, but the par-
> "ticular effect as between two corporations each
> "trying to get the same land" (160 N. Y., 246, 247). The Court of Appeals further held "the
> "command of the constitution that the lands of
> "the Forest Preserve cannot be 'taken by any
> " 'corporation, public or private,' shows an un-
> "mistakable intention to keep railroads out of
> "the Adirondack Park" (160 N. Y., p. 248).

This Court, in affirming this judgment, quoted with approval the language of the Court of Appeals to the effect that the filing of a map gave the railway company an exclusive right as against every railway company and other creatures of the State empowered to use the right of eminent domain (176 U. S., 346); and further said:

> "In this case, use for the park was in itself
> "inconsistent with the use for railroad purposes,
> "and the legislation and the constitution alike
> "forbade this company to acquire for its
> "use any portion of that which the State
> "had taken for its own exclusive and designated
> "purposes" (176 U. S., 349).

There is no foundation for the distinction claimed by the learned counsel for the defendants between

country railways and city railways so far as concerns the acquisition of a prior and exclusive right by a corporation which first files its articles of association, map and profile. On the contrary, the *Suburban Rapid Transit* case, 128 N. Y., 510, recognizes that the doctrine applies to street railways.

The principle established by the authorities already quoted is, that the company first incorporated for the purpose of constructing a railroad between specified points as soon as it has filed its articles of incorporation in the office of the Secretary of the State, made its survey and filed a map and profile of its route in the County Clerk's office, all of which proceedings necessitate the expenditure of a considerable sum of money, thereby acquires a prior and exclusive right to construct a railroad over the route thus specified, which is paramount to that of any other person.

> "By its proceedings it has impressed upon "the lands a lien in favor of its right to con- "struct, which ripens into title through pur- "chase or condemnation proceedings" (110 N. Y., 133).

It acquires no right then as against the land owners, and no easement upon the lands as against them by such a proceeding. Either in the country or the city his title to his land remains absolutely in him until parted with by his own consent or until he has been divested of it by condemnation proceedings, which can only be instituted after an attempt to obtain his consent has been made and failed. The same doctrine has been applied to the rights of persons interested in the city streets, namely, the public authorities, who represent the municipality and the abutting owners. No railroad can be constructed in such a street until after the consent of these persons has been obtained or else

by the institution of legal proceedings the Appellate Division has divested the abutters of their right to prevent the construction of a street railroad. In such a case, where the city, as in New York, owns the fee of the street, no condemnation proceedings are then necessary. There is, consequently, no reason why the exclusive franchise, as against all other persons who wish to construct railroads, should not exist in the case of a street railroad or city railroad as in that of a country railroad. In each case subsequent proceedings are necessary to ripen the lien into title. No case can be cited which makes such a distinction between them. No distinction exists (*Surburban Rapid Transit Co. vs. Mayor,* 128 N. Y., 510).

IX.

It is well settled that such a franchise is property and a contract with the State, which cannot be taken, and the obligation of which cannot be impaired without a violation of the constitution of the United States.

City Railway Company vs. Citizen's Street R. R. Co., 166 U. S., 557: *People vs. O'Brien* 111 N. Y., 1.

In *Chesapeake & Ohio Canal Co. vs. Baltimore & O. R. R. Co.*, 4 G. & J. (Md.), 1, 49, 57, 144, 145, 169, *thirty-nine years had passed since the grant of the franchise without any attempt to use the same*:

> "This franchise, this corporation right, to "select and acquire land for the authorized pur- "poses of a corporation, is property; it is an in- "corporeal hereditament, not a legal title to the "land itself, not a *mere capacity* or *faculty* to ac- "quire and hold land, such as every individual "possesses; but, in addition to such capacity, it

"is a right or privilege, a portion of the eminent "domain vested in the corporation, to acquire "the legal title to land subjected by the grant "to its will, and thus to convert the incorporeal "into a corporeal hereditament, and after the "franchise to choose and condemn land for any "particular public purpose, that portion of the "eminent domain granted and subsisting in one "corporation cannot be bestowed upon another "to the former grant, nor can any other legally "acquire any such right of way or title to the "land over which the franchise extends as will "hinder the former corporation in the exercise "and enjoyment of its franchise."

In *Pearsall vs. Great Railway Company*, 161 U. S., 646; the only power withdrawn from the corporation by an amendment of its charter was that to consolidate with another railway company. This had no pecuniary value, had never been exercised nor contemplated before the amendment; and upon the faith of this no money had been expended. This is far different from an exclusive franchise to construct a railway upon a specified route, upon the surveys of which and in preparation for such construction more than $100,000 has been expended and which has great pecuniary value so that mortgage bonds upon its security could be sold in the market. The latter was a vested right.

Matter of Thirty Fourth Street R. R. Co., (102 N. Y. 343, 351) per Andrews, J.: "The "franchise acquired by a company organ- "ized under its provisions, is perfect ac- "cording to the nature of the franchise "intended to be given, from the moment "the corporation comes into existence. The "legislative grant was conditional and not abso- "lute. * * * *The company upon consent be- "ing refused, is not deprived of its franchise.* A

"failure to obtain such consent simply puts in "abeyance its right to proceed with the con- "struction of the proposed road until the ob- "struction is removed, and this precise situation "was within the contemplation of the legislature "when the act was passed."

In the matter of the application of the Rochester Electric Railway (123 N. Y., 351, 357, 362) no maps of the route had been filed; no notice given to the land owners, it was merely *held* that the railroad company could not maintain a proceeding for the condemnation of land in a highway until it had done this and had obtained the consent of the local authorities. The Court said that the right to the exercise of this franchise was still inchoate until such consent had been obtained. Similarly, in the case of ordinary long-distance railroads, the construction cannot be begun until the consent of the land owners has been acquired, either voluntarily or by condemnation proceedings, but the exclusive franchise still exists, and has been sustained by the Courts in the cases previously cited.

The constitution protects rights which are contingent as well as those that are vested in present provision and enjoyment. It protects contingent remainders.

Dunn vs. Sargent, 101 Mass., 336; *Appeal of Benson*, 22 Pa. St., 164; *White vs. White*, 5 Barb., 474; s. c., 4 How. Pr., 102; *Holmes vs. Holmes*, 4 Barb., 295; the unexercised right to build on land (*Forster vs. Scott*, 136 N. Y. 577, 585), the right to prospective profits under a contract with the State which has not been performed (*Danolds vs. New York*, 89 N. Y. 37, 45); a statutory right to supply water to a city which has never been exercised (*Long Island Water Supply Co., vs. Brooklyn*, 166 U. S. 685); the right to the franchise of being a corporation (*West River Bridge vs. Dix.*, 6 Howard 507; *Richmond vs. Railroad Co.*, 13

IX. Franchise is Property and Contract with the State.

How. 71); a right of way (*Troy & Boston R. R. Co. vs. Northern Turnpike Co.*, 16 Barb. 100); the right to operate a street railway (*People vs. O'Brien*, 111 N. Y. 1); the right to plant an oyster bed (*Huffmire vs. Brooklyn*, 162 N. Y. 584); the husband's right to his wife's choses in action in case he survives her, although such an estate consists of personal property which he has not reduced to possession before the passage of the statute or during the life of his wife, (*Westervelt vs. Gregg*, 12 N. Y. 202; *White vs. White*, 5 Barb. 474); a statutory contract with the United States; this the United States cannot repeal by an act of Congress, although a right to amend or repeal the charter of the corporation has been expressly reserved (*U. S. vs. Central Pac. R. R. Co.*, 118 U. S. 235, 238); a contract with a State for printing or otherwise, although it has not been performed; (*State vs. Banker*, 4 Kansas, 324; *Jones vs. Hobes*, 63 Tenn. 113; *Danolds vs. New York*, 89 N. Y. 36, 45).

Cooley on Constitutional Limitations, 6th Ed., p. 336:

> "Respecting the power to amend or repeal "corporate grants, * * * corporations usually "acquire property under their grants; and any "property or any rights which become vested "under a legitimate exercise of the powers "granted no legislative act can take away."
>
> Citing:
>
> *Commonwealth vs. Essex Co.*, 13 Gray, 239 (253); *Railroad Co. vs. Maine*, 96 U. S., 499; *Sinking Fund Cases*, 99 U. S., 700; See *Cotting vs. Kansas Stockyard Co.*, 183 U. S., 79.

The State decision of the statement in the District Railroad case does not effect our right.

IX. Franchise is Property and Contract with the State.

(*a*) We understand that the defendants concede that if the tunnel act of 1880, quoted *supra* at p. 4 of this brief is valid our franchise is perfect.

(*b*) So far as these complainants are concerned the validity of that statute has been directly adjudicated.

The application to the General Term on the part of the Central Tunnel Railway Company which resulted in the order appointing commissioners, was one made in judicial proceedings and an adjudication *in rem* binding upon all the world (*Matter of Union Elevated R. R.*, 112 N. Y., 61, 70, *supra* Point VII). This order adjudicates both that the Central Tunnel Railway Company is and then was a valid corporation, and that the General Term had power to appoint commissioners, and upon their report to grant permission to construct a railway without the consent of the abutting owners.

Judicial comity requires that the Federal Court in this case, where proceedings have first been instituted in the State Court, should follow the decision of the latter in the same litigation.

This Court has no jurisdiction to set aside the order of the General Term or to declare the same to be void, at least in the absence of fraud. (*Barrow vs. Hunton*, 99 U. S. 80, 82.)

Matter of N. Y. District R. R. Co., 107 N. Y., 42 does not hold the whole act of 1880 to be unconstitutional. On the contrary, the Court, in the conclusion of this opinion, said:

> "The act may stand as an authority for the "construction of an underground street railway "upon the condition of the assent of the city au- "torities and a half of the abutting values, and "rejecting all the provision for the appointment "of commissioners whose order shall be a sub- "stitute."

IX. Validity of the Tunnel Law.

In People ex rel N. Y. Underground Railway vs. Newton, 58 N. Y., Superior Court, p. 439, the General Term of the Superior Court of the City of New York, held that notwithstanding this decision the statute was still in force, except as to so much thereof as the Court of Appeals had held to be unconstitutional.

The Court of Appeals merely held that so far as the Tunnel Law relieved the N. Y. District Railway Company the route for which was partly upon the surface of city streets, from obtaining the consent of the municipal authorities the statute was inoperative.

In the case at bar we have an express judicial decision that the act of 1880 was valid so far as the Central Tunnel Railway Company was concerned, and that the Court had power to appoint commissioners in such a case to grant consent to the railway company.

The charter of the New York District Railway Company made it a street railroad, for the reason that it provided that it should begin upon a certain street, namely, *on* Broadway, at a point 190 feet from the southerly line of Murray Street and thence under certain streets to another point upon the *surface* of a street (107 N. Y., 51).

> "If now we turn to its manner of construc-
> "tion we observe that it proposes to remove
> "the present surface of the street, and make
> "its own roof that surface in the future. Not
> "merely in the easement of the public affected
> "temporarily by the process of construction,
> "but permanently by changing wholly the sup-
> "port of that surface" (107 N. Y., 51, 52).

Consequently, it necessitated the occupation of a portion of the surface of the street and was a street railroad. That is not the case with the charter of the Central Tunnel Railway. The commencement of the route is in City Hall Park, which is not a street, its termination is at the Grand Central Depot, which is

not a street, and no portion of the surface of the street is to be removed by it. Therefore, no portion of the surface of the street is occupied by it. The Central Tunnel Railway Company is, consequently, not a street railway company within the meaning of the Constitution, and so far as it is concerned the validity of the Act of 1880 can be sustained.

A railroad entirely under the street is not a street railroad.

> In *Nichols vs. Ann Arbor and Y. Street Railway*, 87 Mich., 361, 370, "A street railway" is defined as one, "the rails of which are laid to "conform to the line of the surface of the "street, and which is otherwise so constructed "that the public are not prevented from the use "of any part of the street as a public way, car- "rying passengers, stopping at street crossings "to receive them."
>
> See, also, *State vs. Dayton Traction Company*, 18 Ohio Circuit Court, 490; *Hannah vs. Metropolitan Street Railway*, 81 Mo. App., 78.

X.

The validity of the incorporation of the complainants has been adjudicated by the Supreme Court of the State of New York; and this Court is bound by that decision, which is the best evidence of the law of the state upon that subject.

The order of the General Term upon the petition of the Central Tunnel Railway Company (Ex. B, p. 39, fols. 64-66) declares:

> "It satisfactorily appearing to the Court that "the petitioner is a railroad company formed "under Chapter 140 of the laws of 1850, known

"as the General Railroad Act, entitled 'An act
" 'to authorize the formation of railroad corpor-
" 'ations, and to regulate the same,' and all
"acts amendatory thereof, or supplementary
"thereto, and incorporated for the purpose of
"constructing, maintaining and operating a rail-
"road for public use in the conveyance of per-
"sons and property in the City of New York,
"commencing at a point at or near the City
"Hall Park in said city, and running thence nor-
"therly to and under Chambers Street and
"through the block to and under Reade Street
"to Elm Street; thence northerly through and
"under Elm Street to and under Spring Street;
"thence northerly through the block and under
"the cross streets to and under Great Jones
"Street; thence northerly through and under
"Lafayette Place to and under Astor Place and
"Eighth Street; thence northerly and through
"the blocks to and under Ninth Street to Fourth
"Avenue; thence northerly through and under
"Fourth Avenue to and under Forty-second
"Street, to or near the Grand Central Depot,
"connecting with the Fourth Avenue Improve-
"ment, and that, according to the route and plans
"adopted by the petitioner, it is necessary to
"build said railroad underground and in a tun-
"nel, and that it is the intention of the petitioner
"so to build such railroad under the provisions
"of Chapter 582 of the Laws of 1880; and it
"further appearing to the Court that the con-
"sent of the owners of one-half in value of the
"property bounded on the line of such road,
"cannot be obtained." It then appoints com-missioners with all the powers conferred by the said Chapter 582 Laws of 1880.

X. Res Adjudicata.

This is a decision *in rem* which binds all the world.

Matter of Union Elevated R. R. Co., 112 N. Y., 61, 70, per Gray, J.: "The proceedings be-"fore this tribunal are *in rem* and, under well "settled rules should be conclusive upon all "mankind." See also, *Porter vs. Purdy*, 29 N. Y., 106; *McIntosh vs. Pittsburgh*, 112 Fed. R. 705.

The validity of the incorporation of the Rapid Transit Underground Railroad Company has been established by the judgments of the Supreme Court of the State of New York in the actions brought by the City of New York to collect taxes from them. These judgments are estoppels upon the City of New York, the officers and citizens of that city and all persons subsequently contracting with the city.

Even if these adjudications were not pleaded this Court would take judicial notice of the same. (*Owings vs. Hull*, 9 Peters 607; *Mills vs. Green*, 159 U. S. 651.)

Even if they were not estoppels, they are evidence of the law of the state upon the subject, which this Court is bound to follow; since they were made before the matters in controversy here arose, and relate to a matter of purely local law, the existence and rights of these corporations, and deny no right claimed under the contracts with the state embodied in their charter.

(*Hancock vs. Louisville & N. R. R. Co.*, 145 U. S. 409; *Fitzgerald vs. Mo. Pac. R. R. Co.*, 45 Fed. R., 812.)

XI.

Independently of the validity of so much of the Tunnel Law as allows the consent of the General Term to take the place of the consent of the municipal authorities, our franchise is still perfect.

But even were the rule otherwise, and had this Court the power to disregard the order of the General Term, still the complainants have the right to maintain this bill. It is conceded by the demurrer that the charter of the Rapid Transit Underground Railway Company is still in force, and that that was the first corporation which acquired the right to build a railroad under the streets in question, except its predecessors, whose rights have been assigned to it. That corporation has been prevented by the delay of legal proceedings and the force and threats of the defendants from beginning the construction of its public work. It has the right to an injunction to protect its franchise.

Moreover, it is alleged in the bill (p. 28, fols. 46, 47) and admitted by the demurrer, that:

> "The Common Council, the Mayor and the "local authorities of the City of New York, in "accordance with the provisions of the consti- "tution of the State of New York * * * "have duly given their consent to the construc- "tion of an underground railroad and tunnel "upon the route specified in the articles of as- "sociation and said maps of the said Central "Tunnel Railway Company, and upon the route "of said Central Tunnel Railway Company and "of your orators. The Appellate Division * * "has appointed three commissioners to de- "termine at a hearing of all parties interested "whether an underground railroad and tunnel

"ought to be constructed and operated upon the "route specified in the articles of association "and said maps of the said Central Tunnel Rail-"way Company, and of your orators. Said com-"missioners after duly hearing all parties inter-"ested, in accordance with said constitution and "the said Rapid Transit act have duly deter-"mined that such a railroad and tunnel should "be constructed and operated upon said route. "Their determination in accordance with said "constitution and the said Rapid Transit act "has been duly approved by the said Court and "has been taken in lieu of the consent of the "property owners of property bounding upon "said route. The date of the approval of said "Court was on or about April 6th, 1898. There-"upon, by the entry of such order, said Appel-"late Division perfected and confirmed, as your "orators are informed and believe, the right of "your orators and the exclusive franchise of "your orators to construct a street railroad and "tunnel upon said route."

As soon as that order was entered, consent to such construction of the street railway was immediately granted; and it enured to the benefit of whatever corporation had a right to the same, namely, such as either should acquire by purchase from the Rapid Transit Commission under the Rapid Transit Act, or had before the passage of such act acquired such right, by previous proceedings. The Constitution of the State of New York (Art. III, §18) does not provide that *no person* shall construct a street railroad without the consent of the abutting owners, or the General Term, and that of the local authorities, but that,

"No law shall authorize the construction and

"operation of a street railroad except upon con-
"dition that the consent of the owners in value
"of the property bounded on, and the consent
"also of the local authorities having the con-
"trol of, that portion of a street or highway
"upon which it is proposed to construct or
"operate such railroad be first obtained, or in
"case the consent of such property owners can-
"not be obtained, the Appellate Division of the
"Supreme Court, in the department in which
"it is proposed to be constructed, may, upon ap-
"plication, appoint three commissioners who
"shall determine, after a hearing of all parties
"interested, whether such railroad ought to be
"constructed or operated, and their determina-
"tion, confirmed by the Court, may be taken
"in lieu of the consent of the property owners."
And that "the legislature shall not pass any
"private or local bill * * * granting to any
"corporation, association or individual the right
"to lay down railroad tracks. Granting to any
"private individual association or corporation
"any exclusive privilege immunity or franchise
"whatever."

It is clear that the intent of the Constitution was not that each successive corporation which wished to build and operate a street railroad should obtain a new consent, but that one consent should be in lieu of all.

Such consent was to be withheld or granted in view of the public good that the railroad would serve, and not to depend upon the personality or the political affiliations of those who were to build and operate the railway. Otherwise, such franchises would not be assignable. (*Geneva & Waterloo Railway Company v. The New York Central & Hudson River Railroad Company*, 163 N. Y., 228, 235, 236.) For a personal

license or contract of employment is never assignable. But, however this may be, the defendants upon this demurrer are bound to admit the language of the bill, which alleges specifically that this consent was given to the construction of the street railroad specified in the articles of associaton of the Central Tunnel Railway Company, and that such consent enured to the benefit of the complainants and perfected and confirmed their exclusive franchise to construct a railroad and tunnel upon said route.

The defendants have hitherto made no attempt to controvert this proposition beyond characterizing it as "sheer effrontery" and by a collection of those abusive epithets, which they hope will supply the place of arguments. This Court cannot, we presume, take judicial notice of the language of the order of the Appellate Division and of the resolution of the common council. But if these are to be examined, it will be found that both merely approved the right and method of construction, and that both were silent as to the persons who were authorized to build and operate the railroad.

XII.

The defendants cannot claim that either corporation has forfeited its franchises by non-user, or that its corporate existence has ceased.

(*a*) There is no plea of *nul tel corporation* and the demurrers do not raise this point nor assert any incapacity of the complainants to sue or otherwise.

The point is consequently waived.

Chicago v. Cameron, 22 Ill., App. 91 ; *Conard v. Atlantic Ins. Co.*, 1 Peters, 386.

(*b*) This is a rule of equity practice and of general jurisprudence as to which the Federal Courts are not bound by the decisions of the State of New York, even were they against us which we deny.

(*Gordon v. Hobart*, 2 Sumner, 404; *Burgess v. Seligman*, 107 U. S., 20.)

The only person that can make this claim is the State, or possibly a property owner in a condemnation proceeding. The rule of law is well stated by Mr. Cook in his valuable Treatise on Corporations §637:

> "The question now arises whether the State "or any person, either as plaintiff or defendant, "may allege forfeiture or dissolution or non-"incorporation where there have been no *quo* "*warranto* proceedings instituted and prosecut-"ed by the State to judgment. With a few ex-"ceptions, such an allegation is not allowed. "A creditor of a supposed corporation cannot "ordinarily hold the stockholders liable as part-"ners, although they did not legally incorpor-"ate; it is true also in certain cases where a "stockholder is liable to corporate creditors up-"on a dissolution of the corporation the disso-"lution is held to exist where a corpor-"ation is hopelessly insolvent, and it is the "law that where a railroad corporation at-"tempts to acquire a right-of-way, the person "whose property will be affected thereby may "oppose the acquisition of the right-of-way by "showing that the company is not legally incor-"porated. But, aside from these exceptions, "no one is allowed to assume that the corpora-"tion is dissolved, or its franchises forfeited, or "its incorporation illegal until after such a re-"sult has been decreed by a Court in a proceed-"ing instituted for that purpose by the State,"

XII. Defendants cannot claim Forfeiture.

Ibid, note 7: "Where two railroad companies "claim a right of way, one cannot claim that "the other's charter is forfeitable" (citing *Central Cross Town R. R. Co. vs. Twenty-third St. R. R. Co.*, 54 How. 168-185).

There the plaintiff sought an injunction against the laying of railway tracks which would interfere with the plaintiff's route. Judge Sanford said:

> "One such objection speaks of the right of "the plaintiff in the Bleecker Street and Fulton "Ferry R. R. Co. and its corporate franchises "(1) by non-user (2) by insolvency. The dis- "position which was recently made by the Court "of Appeals of a like objection in the matter "of the New York Elevated R. R. Co., al- "ready cited, renders superfluous any extended "discussion of this point. The forfeiture of "corporate rights is a sovereign prerogative to "be enforced only by and in the name "of the people of the state acting in their "sovereign capacity. It 'cannot be taken "'advantage of or enforced against a cor- "'poration collaterally or incidentally or in "'any other mode than by a direct proceeding "'for that purpose against the corporation, and "'the government creating the corporation can "'alone institute the proceeding.'"

In the case cited (*Re N. Y. El R. R. Co.*, 70 N. Y., 327, 338) an appeal was taken from an order of the General Term affirming the report of commissioners determining that the petitioner might construct its railway upon a certain route. The appellants, who were property owners, claimed that the franchise of the corporation had been forfeited by non-user, and that its corporate existence had ceased. It was *held* that the property owners could not take advantage of this objection in that proceeding.

XII. Defendants cannot claim Forfeiture.

In *New Jersey Southern R. R. Co. vs. Long Branch Commissioners*, 39 N. J. Law, 28:

Held, in a proceeding to enjoin municipal officers from taking a railroad's right of way, that the defendants could not claim that the corporate franchise had ceased and been forfeited by non-user.

In *People's Ditch Co. vs. 176 Inland Water Co.*, 111 Cal., XVI; S. C., 44 Pac. Rep., 176, *Held*, that in a suit by a water company to enjoin another corporation from interference with its water rights the corporate existence of the plaintiff could not be questioned.

See also, *Fresno, C. & I. Co., vs. Warner*, 14 Pac. Rep., 37 (Cal., 1887); *City of Denver vs. Mullen*, 7 Col., 345.

In *American Cable Ry. Co. vs. Mayor of New York*, 68 Fed. R., 227, 228:

The report does not show under which of the New York statutes the railway company was organized, but it seems fair to presume that it was the general act; for the defendant argued that the complainant's corporate existence had been terminated under the statute providing that in case of a default "its corporate powers shall cease," and the New York cases upon which the defendants here rely were then cited.

Judge Wheeler said:

> "The defendants now make question about "the corporate existence of the plaintiff princi- "pally with reference to the seasonable com- "mencement of corporate business. The cor- "poration was organized, and took the title to "this patent, which seems to be within the scope "or its corporate powers. No proceedings have "been taken to terminate it. Under these cir- "cumstances, it seems to exist, so far, at least, "as to be able to maintain this suit against "wrong doers for trespassing upon this corpor- "ate property. Decree for plaintiff."

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XII. Defendants cannot claim Forfeiture.

In the same case, upon appeal, 70 Fed. R., 853, 854, the Circuit Court of Appeals said:

> "The cause was argued before Judge Wheel-
> "er upon the sufficiency of proof of title, the
> "corporate existence of the plaintiff, and the
> "effect of the Italian Patent, who found each
> "of these points in favor of the complainant.
> "* * * * *We perceive no adequate reason*
> *"to question the correctness of Judge Wheeler's*
> *"conclusions."*

Upon a point, however, as to which Judge Wheeler had been bound by a previous ruling of Judge Cox, namely, the non-patentability of the invention, the decree was reversed.

To the same effect is:

> *Santa Rosa City R. R. Co. vs. Central St. Ry. Co.* (Cal. 1895), 38 Pac. Rep., 986; and
> *So. Pac. R. Co. vs. Orton*, 32 Fed. R., 457, 471, per Sawyer, J.:
> "The State of California and the United
> "States being satisfied with the acts of the plain-
> "tiff in respect to the use of its franchise, the
> "grant, and construction of the road, the de-
> "fendant, a mere stranger, without any inter-
> "est whatever, cannot raise the question."
> Citing:
> *Schulenberg vs. Harriman*, 21 Wall. 44; *U. S. vs. Repentigny*, 5 Wall., 267, 268; *So. Postal Tel. & Cable Co. v. Oregon Short Line Co.*, 114 Fed R., 787, 789.
> In *Olyphant Sewage Drainage Co. vs. Borough of Olyphant*, 196 Pa. St., 553, 554, 555, 557:

The plaintiff filed in April, 1899, a bill in equity to

enjoin the officers of the borough from preventing it from constructing a sewer, which it then for the first time attempted to begin. The plaintiff was organized in December, 1895, and then acquired the franchises of a previous corporation of the same name from the purchaser of the same at a sheriff's sale under writ of *fi fa* after judgment, execution and a return of *nulla bona* against the old company. The former company was organized February 27, 1894, and on that day obtained by an ordinance of the Borough Council the right to construct the sewer in question. No part of the work was begun or attempted to be begun before April, 1899. The defendants offered no evidence, but claimed that the evidence offered by the plaintiff proved that the bill should be dismissed. They relied on the Act of May 16, 1889, Pa. P. L., 242, Sec. 11:

> "If any company incorporated under this act, "or any of its supplements, shall not proceed "in good faith to carry on its work and con- "struct or acquire its necessary buildings, struc- "tures, property or improvements within the "space of two years from the date of its letters "patent, and shall not within the same space "of five years thereafter complete the same, the "rights and privileges thereby granted to said "corporation shall revert to the common- "wealth."
>
> "The Supreme Court said: "Tested by the "settled rule of our cases, the conclusion "reached by the learned Judge of the Common "Pleas is right for the reasons stated by him. "We have uniformly held that the validity of "a charter for a public purpose cannot be de- "termined in a collateral proceeding by a pri- "vate suitor. It can be done only in a direct "proceeding to which the commonwealth is a

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"party. Among the more recent cases upon the "subject are *Hinchman v. Philadelphia and "Westchester Turnpike Road Co.*, 160 Pa., 150, "and *Downingtown Gas and Water Co. v. Bor- "ough of Downingtown*, 193 Pa., 255. "Whether a right or franchise claimed by a "corporation is conferred by its charter may be "inquired into in a proceeding at law or in "equity by a party injured, as provided by an "Act of June 19, 1871, P. L., 1361; but whether "for any reason the charter of a corporation "originally invalid or has been forfeited is a "question which the commonwealth only can "raise."

In *Briggs vs. Cape Cod Ship Canal Co.*, 137 Mass., 71, 72, the charter provided that if at least $25,000 were not expended in construction within four months from the passage of the act "this corporation shall "cease to exist."

The Court said: "It is too well settled to ad- "mit of discussion that a corporation can be "judicially determined to have ceased to exist "only in suit to which the commonwealth is a "party.—The act of incorporation is a contract "between the commonwealth and the cor- "poration; whether the corporation has com- "plied with the conditions is a question of fact "to be judicially determined. The common- "wealth may waive a strict compliance with the "terms of the act, and may elect whether it "will insist upon a forfeiture if there has been "a breach of the condition."

Cincinnatti, LaFayette & Chicago R. R. Co., vs Danville & Vincennes Ry Co., 75 Illinois, 113:

Held, that upon a bill to enjoin a railway company from building upon the plaintiff's right of way the de-

fendant could not claim in defense that the plaintiff was not a corporation.

It is well-settled law in the Federal Courts that a right of way, even when it has been unoccupied and no consideration paid therefor, does not, *ipso facto*, lapse for failure to build the railroad in accordance with the terms of a statute, which provides that, in case the railroad is not built within a specified time, the same shall revert to the United States; but that the grantee retains the right to the same, and the Courts will protect it against trespass by others until the United States has asserted the forfeiture by re-entry or judicial proceeding.

> *Schulenberger vs. Harriman*, 21 Wall. 44; *VanWyck vs. Knevals*, 106 U. S., 360; *Grinnell vs. Railroad Co.*, 103 U. S., 739; *Bybee vs. Oregon, &c., R. Co.*, 139 U. S., 663,-676.

In the last case the statute provided that in case of default "this act shall be null and void," &c.

XIII.

Even if the charter of the Central Tunnel Railway Company lapsed, its exclusive franchise to construct a railroad upon the route in question survived, and the persons to whom that franchise was legally transferred, namely the Underground Railroad Company of the City of New York and the Rapid Transit Underground Railroad, had the right to enforce the same.

It would require very clear language to convince a Court that it was the intention of the legislature that a franchise upon which, as here, $100,000 had been expended, should be thus forfeited without a hearing.

XIII. Franchise survives Charter.

It will be remembered that the statute upon which the defendants rely (N. Y., L. 1867, Ch. 775, Sec. 1) does not provide for a forfeiture of any franchise or rights of way which a railroad company may have acquired, but merely provides that, upon its failure to finish its railroad and put it in operation within the ten years in question, "its corporate existence and powers," not its franchises, "shall cease." That, upon the termination of the corporate existence of a railroad company, any franchise to build over a specified route and any right of way that it may have acquired remains unaffected, is well settled.

In *People vs. O'Brien*, 111 N. Y., 1, that question was carefully considered after the repeal by the Legislature of the act incorporating the Broadway Surface Railroad. It was held; that so much of the repealing act as provided for a forfeiture of the franchise to construct and operate a street railway upon Broadway was an infringement of the Constitution of the United States, as an impairment of the obligation of a contract, and consequently void; and that the franchise survived the termination of the corporate existence of the original grantee. The Court of Appeals said, speaking through Ruger, C. J. (at p. 38):

> "That a corporation, although created for a "limited period, may acquire title in fee to lands "or property necessary for its use was decided "in *Nicoll vs. N. Y. and E. Ry.*, 12 N. Y., "121." At p. 42: "It is a matter of public "history that one-half of the railroads of the "state are now operated by organizations other "than those to whom the franchises were origin- "ally granted, notwithstanding their dissolution "through transfers effected by the foreclosure "of mortgages and otherwise. The statutes "cited, as well as others not specially referred

"to, indicate the general policy of the state to "render such interests independent of the life "of the original corporation and transferable "as property by means of judicial proceedings "and otherwise under certain restrictions not "pertinent to our present purpose particularly "to consider."

In *Sulphur Springs, Mount P. Ry. Co. vs. St. Louis A.* and *T. Ry. Co.*, 2 Texas Civ. App., 650 (S. C., 22 S. W. Rep., 107), *held*, that the laches and forfeiture of a corporate charter for failure to build a railroad within three years after incorporation did not affect its right of way which then survived for the benefit of all interested in its assets, and that another company subsequently incorporated could not build a railroad for itself on it.

See also, *New Orleans, S. F. & L. R. R. Co. vs. Delamore*, 114 U. S. 501; *Chesapeak and Ohio Canal Co. vs. Baltimore and O. R. R. Co.*, 4 Gill. & J. (Md.), 1, 123.

Cook on Corporations, §913: "The repeal "or lapse of the charter does not put an end "to the contract or right to operate the road on "the streets."

So. Pac. R. vs. Poole, 32 Fed. R., 451.

Head note: "The filing of the map of general "location of the line of the road by the Southern "Pacific Railroad Company of California, in "pursuance of the Act of Congress, inured to "the benefit of the Southern Pacific Railroad "Company of California, as it existed after its "consolidation, and the amendment of its arti-"cles of association, as the successor in interest "of the corporation, as it existed at the time of "the passage of the act of congress, and of the "filing of said map, even if the two corporations

XIII. Franchise survives Charter.

"cannot be considered as, technically, the same "corporation.'

Canal & Claiborne R. R. Co. vs. St. Charles St. R. R. Co., 44 La. Ann., 1069, 1074.

"When the contracting parties to the contract "of July 26, 1870, met, they met to deal with an "assignable transmissible right. Each of the "parties was expressly contracting for itself, its "successors and assigns. Neither corporation "owned its existence to a charter granted to it, "but both were created by notarial act under the "authority of a general law for the formation "of corporations."

Morgan vs. Des Moines Union Ry. Co. (Iowa, A. D. 1900), 85 N. W. Rep., 902, 906; *held* that a grant by city of a right of way over a street is assignable.

Close vs. Van Loon, 6 T. & C., (N. Y.) 459, 460, was a suit for penalties "for running a tollgate on "a turnpike." The plaintiff claimed the franchise to collect tolls under a conveyance from a turnpike repairing corporation. The Court said, through Boardman, J.:

"Nor is it of the slightest consequence in "this case whether the turnpike company has "been dissolved or still exists. * * * So far "as a forfeiture is urged it is sufficient to say "that the franchise must be forfeited by judicial "proceedings before an individual can avail "himself of its misuser, or omission."

(Citing, *Thompson vs. N. Y. & Har. R. R. Co.*, 3 Sand. Ch., 625; *Adams vs. Black*, 6 Hill., 271.)

Weatherly vs. Capital City Water Co. (Ala.), 22 So. Rep. 140, 144, 145:

Headnote: "A decree of dissolution of a "water company does not abrogate the contract "of the city with the owners of the water works "for a supply."

McCLELLAN, J.: "Contracts within corporate competency, and of a nature to continue after dissolution and bind the property, are not abrogated by the dissolution, but are of continuing efficacy against the successors of the defunct corporation in ownership of its property, assets and franchises. * * *

"This use of the streets, alleys and public grounds, and right of continued user thereof, was and is a property right, protected from destruction by organic guarantees."

"The contract between the city and the owners of the water works was not abrogated by the decree of dissolution."

XIV.

The defendants are estopped from claiming that by non-user the complainants' franchises and corporate existences have been forfeited; and under the allegation in the bill the court should not permit them to make such a claim.

(*a*) The bill alleges in language covering the whole period of time since the incorporation of the Central Tunnel Railway Company

> *"the said defendants, by force and threats, have "hitherto prevented your orators from con-"structing the same"* (p. 28, fol. 47).

Coney Island, Ft. Hamilton & Bklyn. R. R. Co. vs. Kennedy, 15 App. Div., 588, 592, 593, through Judge Cullen, who is now on the Court of Appeals: "It is also contended that the "franchises of the plaintiff have become extinct "by its failure to complete the construction of

"its road within three years after obtaining the "consent. There are two perfect answers to "this claim. The first is that by the amendment "of 1893, Ch. 434, to § 99 of the Railroad "Law, Laws of 1890, Ch. 565, non-compliance "with these conditions of the grant does not "*ipso facto* dissolve the corporation, or de- "termine its rights, but is only a ground of "forfeiture, a forefeiture which can only be "adjudged in a direct proceeding brought by "the state for that purpose. (Matter of *Brooklyn El. R. R. Co.*, 125 N. Y., 434; *Matter of Kings Co. El. R. R. Co.*, 105 N. Y., 97). "*The "second is that these very defendants, by their "acts, have prevented the plaintiff from con- "structing its road, and complying with the "provisions of the statute.*"

In *Dusenbury vs. N. Y. W. & C. Traction Co.*, 46 App. Div., 267, 274, speaking through Hatch, J.: "It is possible that the persons "seeking to *take advantage of the forfeiture "should themselves be estopped* from insisting "upon it; and as the defendant may make a case "which will relieve it from the condition thus "imposed, legal proceedings are necessary to "declare the existence of the forfeiture. (*Matter "of Kings Co. El. R. R. Co., supra*," 105 N. Y. 120).

The same rule applies to this statute that governs defenses founded upon the Statute of Limitations.

Lamb vs. Markin, 43 N. J. Eq., 34, 37: "The "power of a court of equity *to prevent a defend- "ant, by injunction, from setting up the statute "of limitations* as a defense to an action at "law which he has wrongfully procured to be "restrained until sufficient time has elapsed to

"render such a defense available, must, I think, "on the plainest principles of justice, be re- "garded as entirely free from doubt. The "reasons which should control the action of the "court in such cases were stated by Ch. Wil- "liamson in *Doughty vs. Doughty*, 3 Stock (N. "J.), 347, as follows: 'It would be uncon- " 'scientious for a party to plead the statute of " 'limitations against an adversary who, at his " 'solicitation, has been enjoined from prosecut- " 'ing his suit; and it would seem to be the " 'appropriate remedy that the same instrument " 'which he had used to interrupt the legal pro- " 'ceedings of another should be interposed, as " 'a shield, to prevent his taking an undue ad- " 'vantage of such interruption.' "

"But the power of the court thus to control "a citizen and deprive him of a right of de- "fense, conferred by legislative enactment, rests, "in my judgment, exclusively on the maxim "that no man shall be permitted to take ad- "vantage of his own wrong. There is no laches "in such a case. His adversary (the plaintiff) "did not sue before because he was prevented. "And this is the foundation of the jurisdiction "which equity exercises in such cases."

Devereaux vs. City of Brownsville, 29 Fed. R., 742, 751:

"If a State, with the deliberate and confessed "purpose doing that, repeals the charter of a "municipal corporation to enable it to evade or "avoid the writ of *mandamus* to enforce judg- "ments against it, thereby disable the plaintiff "from proceeding with the case, the time of dis- "ability should not be computed in the period "of the statute of limitations. * * * Since the

"act of arrest complained of here is that of the "State itself by its own legislation, and through "its paramount authority, which none can re- "sist, we find no difficulty in implying from the "new legislation and governmental conduct of "the State an intention to exclude the time of "disability from the statute, as is done in case "of war. *Hanger vs. Abbott*, 6 Wall. 532; "*U. S. vs. Wiley*, 11 Wall., 508, 513, where it "was ruled that although the *right* to sue was "unimpaired, 'the loss of the ability to sue, " 'rather than the loss of the right, stops the " 'running of the statute.' And in *Braun vs.* "*Sauerwein*, 10 Wall., 218, where the limitation "was suspended by the operation of an act of "Congress, just as we think this legislation "operates, Mr. Justice Strong remarks of the "decision: 'They all rest on the ground that " 'the creditor has been disabled to sue by a " 'superior power, without any default of his " 'own and therefore that none of the reasons " 'which induce the enactment of the statutes " 'apply to his case; that unless the statutes " 'cease to run during the continuance of the " 'supervening disability he is deprived of a " 'portion of the time within which the law con- " 'templated he might sue.' There are other "applications of the doctrine quite as familiar, "as in cases of delay pending appeals. *Mont-* "*gomery vs. Hernandez*, 12 Wheaton, 129, "134."

(*b*) The bill further shows that the railroad companies have paid taxes upon their franchises assessed against them by the municipal, county and State authorities (pp. 13, 14, fols. 23, 24; p. 11; fol. 19.) *The receipt of the taxes upon the franchises estops the city from disputing their existence.*

XV. Delay Sufficiently Excused.

Monroe Water Co. vs. Township of Frenchtown, 98 Mich., 431, 436:

"The tax was assessed against plaintiff as a "corporation, the moneys paid were by the "corporation, and the defendant cannot now be "heard to say that it was not legally in-"corporated."

To the same effect are *Santa Rosa City R. R Co. vs. Santa Rosa St. Ry. Co.* (Cal., 1895), 38 Pac. Rep., 986; *Commercial El. Ltg. Co. vs Tacoma*, 17 Wash., 661, 670; *Spokane St. Ry. Co. vs. Spokane Falls*, 6 Wash., 521, 524.

For other cases where action by a municipality has been held to constitute an estoppel against the claim that a franchise has been forfeited see *Saugatuck Bridge Co. vs. Town of Westport*, 39 Conn., 337; *State ex rel. Attorney General v. Janesville Water Co.*, 92 Wis., 496, 503, 504.

XV.

The delay of these corporations pending the decision of the general term upon the appointment to fill the vacancy in the commission at the application of the Central Tunnel Railway Company was a sufficient excuse for their inaction, which relieves them from any forfeiture that might otherwise have resulted.

(*a*) Until April 6th, 1898, when the Appellate Division entered an order consenting to the construction and operation of a railroad upon the route owned by the plaintiffs, they had no legal right to begin the construction of their tunnel, although immediately

after their incorporation they duly applied for permission. The subsequent delay was due to the inaction of the General Term (pp. 6-9, fols. 22-33).

> *Hunt vs. Smith*, 3 Rich. Eq. (S. C.), 465, 511, per Chancellor Dargan: "*A claim cannot "grow stale while under the action of the "court.*" *Encyclopaedia of Law*, 2d Ed. Vol. XVIII., p. 110: "Though the litigation, after "it is instituted, does progress slowly, the com- "plainant may not be deprived of relief if he "is not solely accountable for the delay. "(*Pendlery v. Carleton*, 59 U. S. App., 288)." (See *Bell v. Bell*, 181 U. S., 175, 179; *Behrens Drug Co. v. Hamilton*, 48 S. W. Rep., 5.)

(*b*) Courts of equity insert implied conditions and exceptions in statutes of this character in the same manner that they do into statutes of limitations and statutes of frauds (*Supra* XIV). Where a case arises which was apparently not within the contemplation of the Legislature, the *casus omissus* is supplied by the Judge, who holds that the Legislature would have excepted the case had its attention been called to its possibility at the time when the bill was pending, and forbids a defense based upon the statute.

> In the *Matter of Kings County El. R. R. Co.* 105 N. Y., 97, 109, 116, 117, the statute directed that the articles of association " 'shall " 'provide for the release and forfeiture to the " 'supervisors of the county, of all rights and " 'franchises acquired by such corporation' in "case such railway or railways shall not be com- "pleted within the time and upon the conditions "therein provided." The Court of Appeals said, through Danforth, J.: "The charter provision "must have a reasonable construction, and it "is plain that the time during which, and with-

"out fault on their part, the company had no "legal ability to commence or carry on the work, "should not be deemed to form any part of the "allotted period."

In that case, in January, 1879, after failing to obtain the consent of the property owners, the railway applied to the Supreme Court for the appointment of commissioners to grant a consent in lieu of the consent of the property owners.

"The report of the commissioners was made "on April 26, 1879. It was favorable to the "road, and on the same day application was "made for its confirmation. It was opposed, "and remained undecided until February 10th, "1880, when confirmation was refused. In "different courts the controversy between the "company and its opposers continued until Sep- "tember, 1880, when it ended in a decision ad- "verse to the company. Since that time the "affidavits show continuous efforts on the part "of the company, among other things, to obtain "the necessary consent of property owners, "which was accomplished December 2, 1885. "It appears, therefore, that without fault on "the part of the company, the intervening time "was unavoidably consumed in part by legal "proceedings, but also by the impossiblity of "obtaining the consent of the property owners "or its equivalent, and that time may therefore "be added to the specified period named in the "articles of association for the completion of so "much of the road as is now in question."

People vs. Broadway R. R. Co., of Brooklyn, 126 N. Y., 29, 40: "It was its duty to use "reasonable efforts and due diligence to obtain "that consent, as it was its duty to use reasona- "ble efforts and due diligence to build its road

"upon the route mentioned. If it had shown "that it could not procure the consent of the "Plank Road Company, that would have been a "reasonable excuse for not building its road "thereon."

In *Regents of the University of Maryland vs. William*, 9 Gill & J. (Md.), 365; *Held*, "that "the assent of the corporation to the forfeiture "of its charter cannot be inferred from mere "non-user of its franchise caused by the at- "tempt of the legislature to forfeit the same."

U. S. vs. Wiley, 11 Wall. (U. S.), 508, 513, 514: "Statutes of limitation are, indeed, statutes "of repose. They are enacted upon the pre- "sumption that one having a well-founded claim "will not delay enforcing it beyond a reasonable "time if he has the power to sue. Such reason- "able time is, therefore, defined and allowed. "But the basis of the presumption is gone when- "ever the ability to resort to the courts has been "taken away. In such a case the creditor has "not the time within which to bring his suit "that the statute contemplated he should have."

Encyclopaedia of Law, Vol. XIII., p. 757: "When there is no person to sue, or no person "to be sued, no laches can be imputed from "failure to bring suit, and, consequently, the "rule is laid down that there must be in exis- "tence both some one who can sue and some one "who can be sued, or the statute of limitations "will not begin to run."

Ibid., Note: " 'Cause of action implies not "only right of action, but also power of action "(*Baker v. Barcliff*, 76 Ala., 414; *Swann v.* "*Lindsey*, 70 Ala., 507; *Sorrels v. Trantham*, "48 Ark., 386; *Hanf v. Whittington*, 42 Ark., "491; *Brenner v. Quick*, 88 Ind., 546, 555)."

XVI.

The corporate existence of the Rapid Transit Underground Railroad Company has not ceased, nor has its franchise been forfeited.

This bill was filed July 9th, 1901, (p. 43, fol. 69). That corporation was chartered on April 9th, 1897, and it consequently has the power to delay the beginning of the construction of its road until 1902, and to delay the completion of the same until 1907, no matter how strictly Chapter 475 of the Laws of 1867 is construed.

XVII.

The corporate existence of the Central Tunnel Railway Company and of the Underground Railroad of the City of New York, into which the former was merged and consolidated, have not terminated, nor have their franchises been forfeited.

The Underground Railroad of the City of New York was organized on October 21st, 1896, and it consequently has until October 21st, 1906, to complete the construction of its railroad.

The Central Tunnel Railway Company was organized on March 21st, 1881, and it is claimed by the defendants that its corporate existence has ceased under § 1 of Chapter 775, Laws of 1867, which provides,

> "if any corporation formed under an act entitled
> " 'an act to authorize the formation of railroad
> " 'corporations and to regulate the same,' passed
> "April 2nd, 1850, shall not, within five years of

"its articles of association, are filed and recorded "in the office of the Secretary of State, begin "the construction of its road and expend there- "on ten per cent. of the amount of its capital, "or shall not finish its road and put in operation "within ten years from the time of filing its "articles of association aforesaid, its corporate "existence and powers shall *cease*."

The defendants contended that, *ipso facto*, upon the termination of the ten years, if it has failed to comply with the statute, the life of the corporation is terminated, without any judicial judgment or decree and without any hearing; so that no excuse which it has to present may be considered; and that this question of fact may be raised in every case in which the corporation is a party. Such an extraordinary construction, which is inconsistent with the principles of common law, in conflict with every man's sense of justice and inconvenient in practice; which authorizes the trial, of such an important question involving the forfeiture of $100,000 in a court of a Justice of the Peace in a suit involving only twenty-five dollars; is one which no Court can adopt unless conclusively bond by authority. Reliance is placed here by the defendant on two cases decided by the New York Court of Appeals, which it is claimed established this principal. These cases are not binding upon the Courts of the United States in an action where the constitutional rights of the corporation are involved. They are in conflict with the overwhelming weight of authority thorughout this country, and they have been practically overruled by subsequent decisions in the State of New York.

(*a*) In this suit, where it is claimed that there has been an impairment of the obligation of a contract made with the State by the filing of a corporate char-

ter, the expenditure of $100,000 of money in preparation for the construction of the railroad, and the payment of franchise taxes and other taxes to the State; it is the duty of the Federal Courts—and they have the power—to construe the statutes of incorporation, which it is claimed constituted the contracts; independently of the State Courts; and they are not bound in their decisions by the decisions of the latter.

In *New Orleans Water Co. vs. Louisiana Sugar Co.*, 125 U. S., 18, 38, this Court, speaking through Mr. Justice Gray, laid down the rule upon the subject after a full consideration of the authorities:

> "When the State Court holds that there was "a contract conferring certain rights and that "a subsequent law did not impair those rights, "this Court has jurisdiction to consider and "construe the construction of the supposed con- "tract, and if it is of opinion that it did not con- "fer the right affirmed by the State Court, and, "therefore, its obligation was not impaired by "the subsequent law, may, on that ground af- "firm the judgment. * * * So, when the "State Court upholds a subsequent law on the "ground that the contract did not confer the "right claimed, this Court may enquire whether "the supposed contract did give the right, be- "cause, if it did, the subsequent law cannot be "upheld."

In *Brayan vs. Board of Education*, 151 U. S. 639, 650:

> "It is necessary to inquire into the existence "and effect of the alleged contract, and that "question must be determined by this Court "upon its own judgment independently of any "adjudication by the State Court."

In *Huntington vs. Attrill*, 146 U. S., 657-684:

"If the State Court gives effect to a subse-
"quent law which is impugned as impairing the
"obligation of a contract, this Court has power,
"in order to determine whether any contract
"has been impaired, to decide for itself what
"the true construction of the contract is."

In *Jefferson Branch Bank vs. Skelley*, 1 Black, 436, 440:

"Of what use would the appellate power be
"to a litigant who feels himself aggrieved by
"some particular State Legislation, if this Court
"could not decide, independently of all adjudi-
"cations by the Supreme Court of the State,
"whether or not the phraseology of the instru-
"ment in controversy was expressive of a con-
"tract, and within the protection of the consti-
"tution of the United States; and that its obli-
"gation should be enforced, notwithstanding a
"contrary conclusion by a Supreme Court of a
"State."

(*b*) The overwhelming weight of authority is to the effect that clauses of a similar character to that quoted are not self-executing, and that under similar statutes the corporate existence continues until the judgment of a Court upon the writ of *quo warranto*.

In *Wallamet Falls C. & L. Co. vs. Kittredge* 5 Sawy. 44; Fed. Cases No. 17, 105, the statute provided that if any corporation should neglect to carry on its business for six months "its corporate powers shall *cease*."

Held, "That such neglect did not terminate
"the existence of a corporation, but that it was
"a cause of forfeiture, of which the state only
"could take advantage."

In *Young vs. Webster City & S. W. R. R. Co. (Iowa)*, 39 N. W. Rep., 234, where the statute pro-

vided that the corporation "should *cease* to exist" by the non-user of its franchise for two years, a similar ruling was made.

See also, *Taylor vs. Holmes*, 14 Fed. Rep., 498, 505.

In *Mylrea vs. Superior S. C. Ry. Co., Wis.*, 1896; S. C., 67 N. W. Rep., 1138, the statute provided that, where a corporation in fact suspended its ordinary and lawful business for one whole year it should be deemed to have surrendered its rights and franchises, and should be adjudged to be dissolved. *Held*, that until the judgment of a Court of competent jurisdiction the corporation retained its existence.

(See *Stolze vs. Manitowoc Terminal Co. (Wisc.)*, 75 N. W. Rep., 987.)

Mr. Cook, in his standard work on corporations, says, speaking of the New York cases (§638):

> "This drastic and dangerous construction of "charters does not commend itself to law and "justice. It adds one more to the perils which "are attached to all mere corporate enterprises. "Even in New York, where the above doctrine "seems to have had its origin, the Courts are "inclined to limit its application. The New "York courts have recently held that a provision "in a charter that unless certain things are done "within a certain time the company should for-"feit the rights acquired, does not work a for-"feiture, *ipso facto*" (citing *Re Brooklyn, El. R. R.*, 125 N. Y. 434).
>
> *Ibid.*: "Forfeiture, *ipso facto*, is a doctrine "of modern date, it is contrary to reason, justice "and the weight of authority."
>
> See, also, *Brooks vs. Cape Cod Ship Canal Co.*, 137 Mass., 71; and the other cases cited *supra*, under Point XII.

XVII. Charters have not Expired.

In *Bybee vs. Oregon & C. R. Co.*, 139 U. S., 663, 678, this Court said, speaking of these New York decisions:

> "The doctrine of these cases has not been uni "versally accepted, however, and in several "States, notably in Massachusetts, it has been "distinctly repudiated." After citing *Briggs vs. Cape Cod Ship Canal Company*, 137 Mass., 71:
>
> "In *Atchafalaya Bank v. Dawson*, 13 La., "497, an act for the incorporation of a bank "provided that, upon the suspension or refusal "of payment in specie for more than ninety "days, the charter shall be, *ipso facto*, forfeited "and void. But it was held that, until the for- "feiture was judicially decreed, neither the for- "feiture nor the cause could be inquired into in "another suit, nor could the existence of the "corporation be questioned incidentally or col- "laterally. To the same effect is the case of "*Lagrange and Memphis Railroad Company v.* "*Rainey*, 7 Coldwell, 420. In this case it was "held that if an act of incorporation fixes a "definite time in which the charter shall expire, "when the time for this expiration arrives the "corporation is dissolved. But if its continu- "ance beyond a fixed time is made to depend "upon the performance of a given condition, "the non-performance of the condition is a "mere ground for forfeiture. 'This, however, " 'can only be taken advantage of by the State " 'in a proceeding in the nature of a *quo* " '*warranto*, and the existence of the corpora- " 'tion can never be collaterally called in ques- " 'tion.' "

In *Chesapeake & Ohio Canal Co. vs. Baltimore & O. R. R. Co.*, 4 Gill. & J. (Md.), 123, the charter of

the Potomac Company provided (§ 18) that, in case it failed within a specified time to make the Potomac River navigable from Cumberland to tidewater for vessels drawing one foot of water at least, "the com- "pany should not be entitled to any benefit, privilege "or advantage under the act," and that "all the in- "terests of the company should be forfeited and *cease.*"

Held, that the corporation continued in existence with all its franchises until dissolved by a decree of a court.

Held, further, that the franchise upon the dissolution of the corporation might be surrendered and assigned to the canal company.

(*c*) *The New York cases* to which reference has been made have been distinguished to such an extent that they *have been practically overruled.* They are: *Matter of Brooklyn, Winfield & Newtown Ry. Co.*, 72 N. Y. 245, and *Brooklyn Steam Transit, Etc., vs. Brooklyn*, 78 N. Y. 524. In the latter case the Court said, speaking of the former decision:

> "It may be that some of the general language "used in that case may have to be limited in "some future case coming under other circum- "stances and depending upon other facts. * * * "Under the law, as we have laid it down in this "and the prior case, it could not take private "property or a public street for the construction "of the last mile. A corporate right *for that "purpose"—namely, the institution of con- demnation proceedings—"would be absolutely "gone, and that is as far as the facts of this case "require us to go now."*

In re Brooklyn El. R. R. Co., 125 N. Y., 434, 441, the Court of Appeals said of these cases, speaking through Judge Earl:

"They are border cases, and the doctrine laid "down in them should not be applied to cases "where the legislative intent of a self-executing "forfeiture is not equally plain. An undue ex- "tension of the doctrine would imperil the vest- "ed rights of individuals, and in many cases "might prejudice the interests of the public."

It was, accordingly, *held*, that a statute was not self-executing which provided that for non-performance of certain conditions the corporation "should forfeit "the rights acquired" by it under its acts of incorporation.

In *Dousenbury vs. N. Y. W. & C. Traction Co.*, 46 App. Div., 267, 268, 273, the corporate charter provided that in case of failure to complete the road before a certain date, "then this franchise shall be forfeited, "and the rights and privileges granted by it shall cease "and determine without any action or proceeding in "law or otherwise."

The Court said, speaking through Hatch J.: "While the language of the twelfth clause of "the consent is broad enough in terms, *ipso* "*facto*, to work a forfeiture without any legal "proceeding, yet we apprehend that such force "and effect should not be given to it. It may "very well be that conditions have existed which "furnished a legal excuse to the railroad com- "pany for not complying therewith."

In *Matter of N. Y. & L. I. Bridge Co.*, 148 N. Y. 540: the charter provided that the bridge should be commenced within two years and continued without any unreasonable delay until completed, "or this act "and all rights and privileges granted hereby shall be "null and void." *Held*, that no one except the State could raise the question of the forfeiture or that the corporate existence had ceased.

XVII. New York Cases Distinguished.

Santa Rosa City R. Co. vs. Central St. Ry. Co. (Cal-1895), 38 Pac. Rep., 986, expressly overrules these New York cases and the former California decisions and holds: that the phrase "a failure to comply with these provisions, work a forfeiture" of the right of way, as well as of the franchise, is not self-executing, and cannot be enforced except in a suit by the State; that acceptance of taxes by the city estops it from setting up the forfeiture; that a grant by the city of the same rights to another corporation is not an assertion of a forfeiture; and then the former may enjoin the latter company.

The *Brooklyn Steam Transit case* arose under a special charter, which provided in far different language from that in the General Railroad Law for a forfeiture, *ipso facto*, as was held by the Court, that, in case of failure to build a mile of road within three years, "this act and all the powers, rights and fran-"chises herein and hereby granted shall be deemed "forfeited and terminated."

In the *Brooklyn, Winfield and Newton Railroad case*, which arose under the General Railroad Law, the defense was set up by a property owner in opposition to a condemnation proceeding, where the statute expressly authorizes a contest as to the corporate existence of the petitioner. L. 1850, Ch. 140, §§ 14, 15; *Re Brooklyn W. & N. Ry. Co.*, 72 N. Y., 245, 249.

There was no claim that the defendants were estopped from setting up the defense that the charter had lapsed. Nor was there any excuse for the delay, such as the pendency of legal proceedings, which were held to prevent the forfeiture in the *Kings County Elevated Railroad case*, 105 N. Y., 97, and other cases quoted *supra*, Point XV.

Nor had the franchise been assigned to a corpora-

tion still in existence. Nor had any substantial sums of money been expended in preparing for the construction and survey of the route. These complainants have spent more than $100,000 for that purpose.

(*d*) This statute was amended by N. Y. L. 1893, Ch. 443, (Vol. I., p. 907, § 5), which provides that:

> "If any such steam railroad corporation, "whose certificate of incorporation was filed "since the year eighteen hundred and eighty, "and whose road, as designated in such certi- "ficate, is wholly within one county and not "more than ten miles in length, has acquired "the real property necessary for its roadbed "by purchase, its corporate existence and powers "shall not be deemed to have ceased because of "its failure to comply with the provisions of "this article; and the time for beginning the "construction of its road and expending thereon "ten per centum of its capital is extended until "thirteen years from the date of the filing of "such certificate, and the time for finishing its "road and putting it in operation is extended "until eighteen years from the date of such "filing."

The complainants have acquired the real property necessary for their roadbed by purchase through the payment of their franchise taxes to the State and City of New York.

XVIII.

The Rapid Transit Act is void as a denial to the complainants of the equal protection of the laws.

The acts of the defendant and the legislation upon which they rely are unconstitutional, because a violation of the Fourteenth Amendment of the Federal Constitution, which ordains that no State shall "deny to "any person within its jurisdiction the equal protec- "tion of the laws."

This question was not before the Court of Appeals in the Sun case. The act of 1896 had not been passed, nor was the contract made when that suit was brought, December 12, 1895.

This point is stated at length in paragraph XVII of the bill (pp. 31, 32, fols. 51-53) and for that reason we now discuss it very briefly. In reliance upon New York Laws of 1896, that Chapter 729 which provides:

> "that any corporation organized under the "corporation laws of this state, and approved "by the said Board of Rapid Transit Commis- "sioners, shall be competent and is hereby au- "thorized to enter into a contract for the con- "struction and operation of any railway pursu- "ant to the provisions of this chapter:"

the Rapid Transit Board has granted to the defendant, the Rapid Transit Subway Construction Company, the right to construct and operate an underground railroad upon our route. That corporation is not organized under the General Railroad Law of this State, nor under any special statute. It is a business corporation, organized under the Business Corporaroad Law. None of the safeguards to the passengers, abutting owners and public at large which are required

by the General Railroad Law: as to the manner in which it shall operate its railroad, (N. Y. G. L. Ch. XXXIX, Art. II, §§ 12, 31, 34, 35, 37, 38, 39, 45, 56; Street Railroad Law, Art. IV, §§ 101, 138); the precautions for the benefit of abutting owners and passengers which it shall observe (N. Y. G. L., Ch. XXXIX, Art. I, §§ 4, 5, 6, 11, 13, 16, 30, 31, 32, 33, 34, 35, 36, 42, 43, 44, 45, 46, 48, 49, 50, 51, 61, 62, 64, 67, 68; Street Railroad Law Art. IV, §§ 108, 125); the requirement of the payment in full of subscriptions to its capital stock (N. Y. G. L., Ch. XXXIX, Art. I, § 2, Subds. 6, 13); prohibitions against an improper amount of bonded indebtedness (*Ibid.*, Art. I, § 4, Subd. 10); inhibitions against discriminations in the carriage of passengers and freight (*Ibid.*, Art. II, §§ 39, 47, 48; Street Railroad Law, Art. IV, §104); obligation to equality in its treatment of connecting railroads (*Ibid.*, §§ 12, 35, 47); subjection to the jurisdiction of the State Railroad Commissioners (*Ibid.*, Art. II, §§ 59, 67; Art. VI, §157); or of many other obligations to which railrod companies are subjected; are imposed upon it.

It thus has a special privilege and monopoly not granted to any other corporation in this State or in the United States. Such a privilege is void, not only because forbidden by the State Constitution, but also because in violation of the Fourteenth Amendment to the Constitution of the United States.

All other railroad companies in this State, including these complainants, are subjected to penalties, prohibitions and obligations, from which this defendant is relieved. Consequently, the plaintiffs have been denied the equal protection of the laws of the United States.

Connelly v. Union Sewer Pipe Co., 184 U. S. 540.

XVIII. Denial of Equal Protection of the Laws.

In *Niagara Fire Ins. Co. vs. Cornell*, 110 Fed. R., 816: a Nebraska act, which forbade fire insurance companies from making agreements permitted to persons engaged in other business, was held to be void for the same reason.

The same principle invalidates statutes which grant special privileges to a single person natural or corporate, to a municipal as well as to a private corporation.

A number of cases upon this point are collected in the opinion of Mr. Justice Brewer in *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis*, 165 U. S., 150, 164; amongst others:

> "*Janesville vs. Carpenter*, 77 Wisconsin, 288, "in which a statute authorizing suits for in- "junction to be maintained in favor of certain "parties under circumstances differing from "those which obtained in respect to all other "suits of a similar nature was likewise held to "be void."

So in *Durkee vs. Janesville*, 28 Wisconsin, 464, 465, an act was held void which

> "declared that no costs shall be recovered "against the city in any action where the same "is commenced to set aside any tax assessments "or tax deed, or to prevent the collection of "taxes or assessments in said city. It is said "in answer, that these provisions of the charter "are inoperative and void because in violation "of that principle of constitutional law which "prohibits unequal and partial legislation upon "general subjects—the enactment of a special "law dispensing with the general law in a par- "ticular case, or granting to one or corpora- "tion, by way of exemption from the operation "and effect of a general law, a privilege or in- "dulgence which no other person or corporation "has or enjoys. There is no reason to doubt

> "the existence or correctness of the constitu-
> "tional principal which forbids such legisla-
> "tion. Enactments of the kind have frequently
> "been held unconstitutional and void."

Citing a number of authorities, amongst others:

Simonds vs. Simonds, 103 Mass., 572; *Holden vs. James*, 11 Mass., 396

In *Hincks v. Milwaukee*, 46 Wis.,559, *held*, that a city charter, declaring that the city shall not be made liable for injuries caused by the negligence of a contractor in leaving obstructions in a public street, is invalid, as an attempt to grant a privilege or immunity to the city against a general rule of law, while all other municipal corporations are left subject to its operation.

In *Gordon vs. Winchester Building & Acc. Fund Assn.*, 12 Bush, (Ky.), 110, 113; the Court said:

> "That the appellee is a corporation can not
> "effect the decision of this question. It will
> "not be contended that the legislature has power
> "to confer upon a corporation privileges or to
> "grant to it exemptions which it can not con-
> "stitutionally confer upon or grant to a natur-
> "al person."

Held, that an act was void which authorized a corporation to receive a greater rate of interest than was permitted to be taken by other corporations or individuals.

In *State Bank vs. Cooper*, 2 Yerger (Tenn.), 599: *Held*, that a statute which created a Special Court for the determination of suits commenced by the Bank of the State of Tennessee against the officers of the bank and other defaulters to that institution, was unconstitutional and void.

In *Van Zant vs. Waddel*, 2 Yerger (Tenn.), 599: *Held*, that an act was void which gave new and additional remedies to the creditors of two specified banks.

XVIII. Denial of Equal Protection of the Laws.

In *Wally's Heirs vs. Kennedy*, 2 Yerger (Tenn.), 554: *Held*, that an act which authorized the dismissal of a certain class of cases, where prosecuted for the use of another, was also void.

In *Memphis vs. Fisher*, 9 Baxter (Tenn.), 239: *Held*, that an act which provided that *cities of more than a specified population* might sue and obtain provisional remedies and prosecute appeals without giving the security for costs required of other litigants was also void.

See, also, *Cooley's Constitutional Limitations* (6th Ed.), 484-491.

The fact that the statute gives to the Rapid Transit Board the right, arbitrarily, to select the favored corporation does not cure the violation of the constitution. What the Legislature cannot do directly, it may not accomplish by indirection.

The Courts of the United States will interfere and protect the corporation or individual who is denied equality by any branch of the State Government, legislative, executive or judicial.

Yick Wo vs. Minnesota, 179 U. S. 223, 262; 118 U. S. 356, 373, 374, 132; *Stearns v. Central of Georgia Ry. Co.*, 110 Fed. R. 865; *Riverside S. A. Ry. Co. v. Riverside*, 118 Fed. R. 736, 741.

Corporations, as well as individuals, are protected by this clause of the Fourteenth Amendment; and their constitutional right to equality cannot be denied them under the guise of an amendment to their charters (*Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79).

As regards this point it makes no difference whether or no the complainants have the exclusive franchise which they claim.

It is immaterial that one of the complainants was incorporated subsequently to this statute. The other

was not, and the junior company has succeeded to its rights. Moreover the constitutional protection is for the benefit of the individuals who form or who may wish to form corporations; and their right to organize and to compete upon equal terms with others was impaired by this unjustifiable discrimination.

XIX.

The Rapid Transit Act is also void as an infringement of the constitution of the State of New York.

This Constitution forbids the passage by the Legislature of any private or local bill "granting to any cor- "poration, association or individual the right to lay "down railroad tracks" (Art. III, Sec. 18).

The Rapid Transit Act is printed in the New York Session Laws as a local bill (L. 1895, Vol. II). It was presented to the Mayor of the City of New York for his approval before its final passage. It applies only to the cities of the State with more than one million inhabitants, according to the last preceding census. The old City of New York was the only city with that population. In the opinion of the New York Court of Appeals the bill is a local bill (*The Sun Printing & Publishing Assn. vs. Mayor*, 152 N. Y. 257, 272; See *Stack vs. Brooklyn*, 150 N. Y. 335).

That this constitutional inhibition applies to a grant to a municipal corporation is clear from the language of the section, which contains two clauses in close juxtaposition. One of them forbids the "granting to "any *private* corporation, association or individual any "exclusive privilege, immunity or favor there whatever." The other has just been quoted. The use of the word private in one clause and its omission from the

other clearly shows the intention that the prohibition of the special grant to lay down railroad tracks applies to all corporations, private and public or municipal. This was held by the New York Court of Appeals in 1886 (*People ex rel Harvey vs. Loew*, 102 N. Y., 471, 476).

In the Sun case, the case of Harvey was not mentioned. Since the complainants were both incorporated after the decision in Harvey's case, no subsequent decision of the New York Courts changing the construction of the Constitution then in force can affect their rights.

(*Ohio Life Ins. & Fire Co. vs. Debolt*, 16 How. (U. S.), 416; *Gelpcke vs. Dubuque*, 1 Wall., 175; *Anderson vs. Santa Anna*, 116 U. S., 356; *Southern Pine Co. vs. Hal* (C. C. A.), 105 Fed. R., 84.)

XX.

Since these questions are certainly doubtful, the demurrer should be overruled, and the ultimate decision reserved till the final hearing

See *Kansas v. Colorado*, 185 U. S. 125; *Storms vs. Kansas Pacific Co.*, 5 Dillon, 486; *Burnley vs. Jeffersonville*, 3 McLean, 336; *Standard Oil Co. vs. So. Pac. Ry. Co.*, 42 Fed. R. 295.

XXI.

The relief sought will not block or delay the completion of the construction or the operation of the Underground Railroad.

The demurrer admits: that the complainants are ready and willing and have offered to re-pay to the city the amount which it has advanced for the construction of a railroad and tunnel; and that they are ready and willing, that they have offered to complete the same in accordance with the plans and specifications prescribed by the Rapid Transit Commissioners, which are copied from those previously drawn by the complainants' engineers at the complainants' expense; and to operate the railroad in accordance with the statutes of the State of New York (p. 33, fol. 55, p. 28, fol. 46). The defendants are estopped by their demurrer from disputing the ability of the complainants to do this, which may be made a condition of the decree herein. Moreover, upon the security of so valuable a franchise, the money necessary for this purpose could be borrowed in Wall Street within one-half an hour.

It may be, however, that upon the final hearing after proofs have been taken, the Court will not give us all this relief, but will direct that upon the payment of the value of our franchise an injunction be withheld.

In neither event, will this public improvement be delayed.

XXII.

The decree should be reversed and the demurrers overruled, with costs of this Court and of the Circuit Court.

Respectfully Submitted,
ROGER FOSTER,
Of Counsel for ComplainantsAppellants.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK and another, Complainants, Appellants,

AGAINST

THE CITY OF NEW YORK and others, Defendants, Respondents.

No. 150.

SUPPLEMENTAL MEMORANDA FOR APPELLANTS.

I.

The Judiciary Acts of 1875, 1887 and 1888, following the Constitution, give to the Circuit Court of the United States jurisdiction of all causes "arising under the Constitution or laws of the United States," provided that the matter in dispute exclusive of interest and costs exceeds in value $2,000. It cannot be said that a case has not arisen under the Constitution of the United States because the Court has held therein that the plaintiffs' claim to a right under the Constitution is unfounded.

If the Court is asked to decide a real question concerning the applicability of the Constitution, the case arises under that Constitution and the Circuit Court has jurisdiction to determine the same, whether it sustains the claim of a constitutional right or not. Jurisdiction is the power to declare

the law upon the subject and it is not lost because the relief sought is denied. If that were the case the judgments in all cases denying relief claimed under the Constitution, both in this Court and in the Circuit Court, would be without costs; but an examination of the records will show that that has never been so hitherto. Here, however, the dismissal of the bill was without costs, because the Circuit Court considered that it had no jurisdiction over the subject.

When the Circuit Court decided that the claim of a right protected by the Constitution was unfounded, it did not lose jurisdiction over the other questions raised by the bill. The rule is well settled, that, when a Circuit Court has once obtained jurisdiction over a case, it does not lose the same because of some occurrence during the progress of the litigation which, if in existence at the commencement, would have prevented the attachment of the jurisdiction. This is even the case where the jurisdiction depends upon a difference of citizenship. Thus, a change of citizenship after the jurisdiction has once attached will not divest the same (*Ober* vs. *Gallagher*, 93 U. S., 199, 206; *Stewart* vs. *Dunham*, 115 U. S., 61, 64; *Phelps* vs. *Oakes*, 117 U. S., 236; *Hardenbergh* vs. *Ray*, 151 U. S., 112).

"Having obtained rightful jurisdiction of the "parties and the subject matter of the ac- "tion for one purpose, the Court will make its "jurisdiction effectual for complete relief. Story's "Eq., 64, *K* * * * Having jurisdiction for one "purpose, it may be retained for all within the "general scope of the equities to be enforced." (*Ober* vs. *Gallagher*, 93 U. S., 199, 206, per Chief Justice Waite).

This is even the case when a change of citizenship occurs before an amended bill is filed (*Tug River C. & S. Co.* vs. *Brigel*, 86 Fed. R., 818). The transfer of the plaintiff's interest to a citizen of the same State as the defendant does not divest the Court of

jurisdiction (*Jarboe* vs. *Templer*, 38 Fed. R., 213; *Glover* vs. *Sheppard*, 21 Fed. R., 481). Neither is jurisdiction lost because a defendant ceases to resist the plaintiff's demand (*Park* vs. *N. Y., L. E. & W. R. Co.*, 70 Fed. R., 641). Nor by the addition of new parties whose citizenship would have prevented their original joinder in the suit, whether they are brought in by amendment (*Ober* vs. *Gallagher*, 93 U. S., 199, 206; *Stewart* vs. *Dunham*, 115 U. S., 61, 64; *Phelps* vs. *Oakes*, 117 U. S , 236; *Hardenbergh* vs. *Ray*, 151 U. S., 112); or by intervention (*Park* vs. *N. Y., L. E. & W. R. Co.*, 70 Fed. R. 641; *Society of Shakers* vs. *Watson* (C. C. A.), 68 Fed. R., 730; *Osborne & Co* vs. *Narge*, 30 Fed. R., 805; *United El. S. Co.* vs. *La. El. Co.*, 68 Fed. R., 673; *Henerson* vs. *Goode*, 49 Fed. R., 887; *Belmont Nail Co.* vs. *Columbia L. & S. Co.*, 46 Fed. R., 336; *Sioux City T. R. R. & W. Co.* vs. *Trust Co. of N. A.* (*C. C. A.*), 82 Fed. R., 124; s. c., 173 U. S., 99). So, where at the time of the commencement of the suit, the value of the matter in dispute exceeds the jurisdictional amount, the Court has jurisdiction to enter judgment for a less sum (*Smith* vs. *Greenhow*, 109 U. S., 669; *Wilson* v. *Daniel*, 3 Dall., 401, 407; *Barry* vs. *Edmunds*, 116 U. S., 550, 560; *Gorman* vs. *Havird*, 141 U. S., 206); and will retain jurisdiction for that purpose, although the plaintiff's demand for damages was excessive, unless it clearly appears and is proved that such demand was not made in good faith, but merely in order to bring suit in a Federal court. Neither is jurisdiction divested by an admission in defendant's answer of part of the plaintiff's claim, when, at the time of the commencement of the suit, the complaint shows that the matter in dispute exceeds the jurisdictional amount (*Fuller* vs. *Metropolitan Life Ins. Co.*, 37 Fed. R., 163).

If the theory of the respondents is correct, there is no adequate remedy for a person, who has a right to an injunction, but who is in doubt as to whether the grounds for his relief depend upon the Constitution or upon general principles of equitable juris-

prudence. If he sues simultaneously in the State and Federal court, there may be a plea in abatement or a motion for an election. If he first sues in either Court and is unsuccessful there, his second bill may be dismissed by the other tribunal for laches; and the decree of the State court, at least, against him, is an absolute bar to any suit in the Federal court for the same relief upon other grounds (*Bienville Water Supply Co.* vs. *Mobile*, 186 U. S., 212, 216, quoted at p. 23 of Brief).

II.

Irrespective of the validity of the franchise of the Central Tunnel Railway Company, it is clear that its lessee, the Rapid Transit Underground Railroad Company, has a valid franchise and a vested right to the easement and underground right of way which have been invaded by the defendants. The latter company was organized April 9, 1897, under § 16 of Chapter 39 of the General Laws of the State of New York, known as the Railroad Law. This re-enacts the Tunnel Law of 1880, as amended, by providing that "such road or any part of it may be "built within the limits of *any* city or incorporated "village of this State" (thus including the City of New York), "and run by means of a tunnel under-"neath any of the streets, roads or public places "thereof," provided, that, before construction the consent to the railroad be obtained from "the proper "authorities of the city having control of such "streets, roads, or public places," and the consent of the owners of one-half in value of the abutting land, or if the consent of such property owners cannot be obtained, the consent of the General Term of the Supreme Court in the District, to the rights of which the Appellate Division has succeeded, who must first appoint three commissioners "who

"shall determine, after a hearing of all parties in-
"terested whether such railroad ought to be built
"underneath such streets, road or public places, or
"any of them, and in what manner the same may
"be so built with the least damage to the surface
"and to the use of the surface by the public and the
"determination of the commissioners confirmed by
"the Court may be taken in lieu of the consent of
"the property owners."

As to the constitutionality of this statute, there has been no question. Thereafter the municipal authorities of the City of New York duly consented to the construction of an underground railroad on the route described in the articles of the Central Railway Company and of the Rapid Transit Underground Railroad Company. Subsequently the Appellate Division appointed three commissioners, after the failure of the property owners to give the requisite consent, and on April 6, 1898, duly approved the determination of those commissioners, "that such a railroad and tunnel should be con-
"structed and operated upon said route" (Record, p. 28). This approval perfected the franchise of the Rapid Transit Underground Railroad Company, at least. It makes no difference upon whose application such approval was made, although an application by the Central Tunnel Railway Company is shown by the bill to have been then pending before the Court. It makes no difference under the State Constitution at whose application the consent is given nor was the consent confined by either the municipal authorities or the Appellate Division to municipal construction. The Constitution is quoted at pages 69 and 70 of our brief in chief. It merely provides that "*the consent*" shall be obtained. There is no mandate that such consent shall be confined to a particular person. On the contrary, it has been held by the Court of Appeals, that a consent for the construction of a street surface railroad obtained by a railroad company prior to the adoption of that constitutional provision can thereafter

be enjoyed by a corporation subsequently formed when the former has abandoned its rights to the latter, although such new corporation has obtained no consent to use the street from either the Court, the property owners, or the municipal authorities (*Ingersoll* vs. *Nassau Electric R. R. Co.*, 157 N. Y., 453. See point XI. of Brief, p. 70). In *Geneva & W. Ry. Co.* vs. *N. Y. C. & H. R. R. Co.*, 163 N. Y., 235, the Court of Appeals said speaking through Judge O'Brien: "What the Constitution "and the statute requires in such cases is simply "the consent of the property owners that the high-"way through his property may be burdened with "another easement in the form of a railroad."

It is alleged on the face of the bill and admitted by the demurrer that the consent of the municipal authorities and of the Appellate Division was not limited to municipal construction, but was a general consent to the construction of the railroad by any one who had the prior right thereto. If the defendants refer to the history of the transaction they will substantiate the charges in the bill. Originally, the Rapid Transit Commissioners projected their railroad under Broadway, not under Elm street: saying in their petition to the Common Council: "Legal "difficulties apart from all questions of advantage "have prevented resort to Elm street." That project having failed, application was then made in similar form to that of the Central Railway Company to the Appellate Division, which had before it both applications, and gave its consent in general form stating: "The consent of this Court" was "given to the construction and operation of the said "railway." The language of the municipal authorities, the Common Council of New York City, was similar. This left after that consent was given the construction of the railroad, and the operation of the same to be exercised by the person who had the first right to that franchise. It is conceded in the respondents' brief that the filing of the map and location of the route gives to the locator the prior

right thereto against any other railroad companies, although it is claimed not as against the State.

Here the State has not interfered by taking our route for its own use, nor has the Legislature in the Rapid Transit Act or elsewhere repealed the Tunnel Law or the section of the Railroad Law under which we were incorporated. The general authority given to the Rapid Transit Commission to select an underground route (§§ 4 and 5 of Rapid Transit Act, Bill VII., Rec., 15) must be construed not to include routes previously appropriated by others.

The learned District Judge, who overruled the demurrer shows by his opinion, that he misconceived the law and believed that the consent of municipal authorities must precede application to the Court (Rec., 58). This is required neither by the Constitution nor by any statute. The only prerequisite is the refusal of the consent of the property owners. There is a further misconception upon his part due to a belief that the Street Surface Railroad Law, which by its terms is limited to railroads upon the surface of a street, applies to railroads underground; and that consent to the latter must be given in accordance with the terms thereof which require, that the consent to build a street surface railroad shall be granted to a specified corporation, namely, that which bids at a public auction the highest price for the privilege. Nothing of the sort is to be found in either the State Constitution or the tunnel law, which merely require a consent to the construction of a railroad in a street, not a consent that a favored group of individuals shall make such construction.

Chapter 10 of the New York Laws of 1860, quoted by respondent, also by its terms is confined to railroads upon the surface of a street. Were it otherwise, it has been, so far as underground railroads are concerned, repealed by the tunnel law of 1880, which at its close expressly refers to New York City.

Nowhere in the Rapid Transit Act can be found any declaration that previous rights

of way or tunnel rights or franchises are thereby repealed or their exercise forbidden. It must be presumed, consequently, that the Legislature did not intend that the Rapid Transit Commissioners should interfere with them. For that reason, our Elm street route was at first not selected by those Commissioners who said in their petition to the Common Council: "*Legal difficulties, apart from all questions of advantage, have prevented resort to Elm street.*" The position of the appellants is, therefore, like that of the Suburban Rapid Transit Company in its suit against New York City (128 N. Y., 510, Brief, 53). There as here, after the route was located but before the building of the railroad was begun, a statute was passed which in general terms permitted the city to condemn for public purposes land including that covered by the plaintiff's projected route. It was held, that authority to take the latter was not given to the city.

The omission to obtain the constitutional consent before the appellants filed their maps, did not prevent them from acquiring the route therein described. The consent of the municipality and authorities who jointly own the fee and easement in a street, is nothing more than the consent of the owners of the right of way; and the application to the Court for a consent in lieu of that of the abutters is analogous to a proceeding to condemn their easement. The cases cited in our brief (50–53) hold that the filing of the maps secures a vested right long before the right of way is obtained.

The provision in the Rapid Transit Act concerning the application for the consents of the Common Council and the Court is in § 5 (N. Y. L. 1891, ch. 5, § 5, as amd. by L. 1895, ch. 519, § 2) copied *infra*. This provides merely for an approval "of any such "route or routes and of any general plan of con- "struction of said railway or railways" proposed by the Rapid Transit Commission. The section applies to all cases, both where an underground road is to

be constructed and operated by the City and where, as was the original plan, of the statute and of the commission, and as the act still permits, it is to be built and operated by a railroad corporation for its exclusive benefit. The route adopted by the Rapid Transit Board was our route as described in our articles of association. The plan of construction was our plan, drawn by our engineers, using for that purpose our surveys, plans, maps, figures, estimates and borings upon which we had expended $100,000 (Rec., 4, 28).

III.

We submit that the following section of the Rapid Transit Act denies to the appellants and other taxpayers who have no such exemption from taxation the equal protection of the laws:

§ 35. "The person, firm or corporation operating "such road, shall be exempt from taxation in re- "spect to his, their or its interest therein under said "contract and in respect to the rolling stock and "other equipment of said road, but this exemption "shall not extend to any real property which may "be owned and employed by said person, firm or "corporation in connection with the construction "or operation of said road" (New Section added by N. Y. Laws 1894, Ch. 752, § 9).

Stearns v. *Minnesota*, 179 U. S., 223, 262; *Cheaney* v. *Hooser*, 9 B. Monroe (Ky.), 330; *County of San Mateo* v. *So. Pac. R. R. Co.*, 13 Fed. R., 722; *County of Santa Clara* v. *So. Pac. R. R. Co.*, 18 Fed. R., 385; *Lexington* v. *McQuillan's Heirs*, 9 Dana (Ky.), 513; *State* v. *Readington*, 36 N. J. Law, 66, 70; *Cheshire* v. *County Commissioners*, 117 Mass., 386; *Commonwealth* v. *Clark*, 195 Pa., 634, 635; *Campbell* v. *Shaw*, 11 Hawaiian Rep., 112.

IV.

The following language of Judge O'Brien, in which Judges Bartlett and Vann of the New York Court of Appeals concurred, although from a dissenting opinion, is, we submit, a correct statement of the law (*Ryan* vs. *New York*, N. Y. L. J., Feb. 11, 1904):

"When the State creates a corporation, public or "private, and sends it forth upon its mission, it be- "comes invested by the constitution and the law of "its creation with certain rights and privileges that "are as inviolable as those of private persons. Its "property may not be confiscated or taken from it "except by its consent or by due process of law. It "cannot be denied the equal protection of the law. "The money which a city procures by the exercise "of the taxing power cannot be diverted, directly "or indirectly, to any private purpose or for the "benefit of any class as such. * * *

"Sweeping aside all forms and seeking to estab- "lish the real legal situation, the city in this re- "spect is nothing more than an aggregation of pri- "vate citizens, who are taxpayers, and as such are "entitled, acting in the combination created by the "charter, to the protection, through the legal entity "thereby created, of all those individual rights and "privileges precisely as if each was acting for "himself."

See COOLEY, *J.*, in *People* v. *Common Council of Detroit* (28 Mich., 228).

Respectfully submitted,

ROGER FOSTER,
Of Counsel for Appellants.

Rapid Transit Act, § 5.

(N. Y. L. 1891, ch. 4, § 5, as am'd L. 1895, ch. 519, § 2.)

After any determination by said board *of any such route or routes and of any general plan of construction of said railway or railways*, the said board shall transmit to the common council of said city a copy of said plans and conclusions as adopted. It shall be the duty of such common council upon receiving such copy of plans and conclusions to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said Common Council shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within four weeks after the copy of such plans and conclusions adopted by the Board of Rapid Transit Railroad Commissioners shall have first been received by said Common Council, a final vote shall be taken thereon, by ayes and nays, in the form of *a vote upon a resolution to approve such plans and conclusions, and to consent to the construction of a railway or railways in accordance therewith*. Upon the adoption of such resolution by a majority vote of all the members of the Common Council and the approval of the Mayor, and in the case of the refusal or failure of the Mayor to approval such resolution, then by a two-third vote of all the members of the Common Council, *the said plans and conclusions shall be deemed to have been finally consented* to and adopted, *and such consent shall be deemed to be the consent of the local authorities of such city;* provided that where in any such city the exclusive control of any street, road, highway or avenue which is to be used or occupied by any railway or railways constructed under the provision of

this act, is by law, vested in any local authority other than the common council of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railway thereunder shall be given by such local authority in place of and if required in addition to such approval and consent by said common council and with like effect. Upon obtaining the approval and consent of the local authorities as above provided, the said Board of Rapid Transit Railroad Commissioners shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. For the purposes of this act the value of the property bounded on that portion of any street or highway in, upon, over or under which it is proposed to construct or operate such railway or railways, or any part thereof, shall be ascertained and determined from the assessment roll of the city in which the said property is situated, confirmed or completed last before the local authorities shall have given their consent as above provided. If such consents of property owners cannot be obtained, the said board may, in its own name, make application to the General Term of the Supreme Court in the Judicial District in which such railway is to be constructed for the appointment of three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. Two weeks' notice of such application shall be given by daily publication thereof, Sundays and holidays excepted, in six daily newspapers published in the city where such proposed railway is to be constructed, if there be so many newspapers published in said city, and if not, then in all the daily newspapers published in said city. The newspapers in which said publication shall be made shall be designated by the General Term of the Supreme Court, to which such application is to be made on the application of the commissioners without notice. The

said General Term, upon due proof of the publication aforesaid, shall appoint three disinterested persons who shall act as commissioners, and such commissioners, within ten days after their appointment, shall cause public notice to be given in the manner directed by the said General Term of their first sitting, and may adjourn from time to time until all their business is completed. Vacancies in such commission may be filled by said General Term after such notice to persons interested as the General Term may deem proper, and the evidence taken before as well as after such vacancy occurred shall be deemed to be properly before such commissioners. *The said commissioners shall determine*, after public hearing of all parties interested, *whether such railroad ought to be constructed and operated*, and shall report the evidence taken to said General Term, together with a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road, shall, when confirmed by said court, be taken in lieu of the consent of the property owners above mentioned. Such report shall be made within sixty days after the appointment of said commissioners, unless the said court or a judge thereof shall extend such time.